83-1008

No.

In the Supreme Court of the United States

October Term, 1983

PENNSYLVANIA DENTAL ASSOCIATION;
Petitioner

DELAWARE COUNTY DENTAL SOCIETY; ERIE COUNTY DENTAL ASSOCIATION, INC; HARRISBURG AREA DENTAL SOCIETY; LUZERNE COUNTY DENTAL SOCIETY; MONTGOMERY-BUCKS DENTAL SOCIETY; ODONTOLOGICAL SOCIETY OF WESTERN PENNSYLVANIA; SCRANTON DENTAL SOCIETY; and YORK COUNTY DENTAL SOCIETY

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD; and DONALD S. MAYES, D.D.S., IN HIS INDIVIDUAL CAPACITY,

BRUCE CUTLER,
Respondent

PETITION OF PENNSYLVANIA DENTAL ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether during pretrial discovery in a case before a United States District Court, requesting production of a non-party newsperson's source documents for a published newspaper article, which documents reflect conversations with an attorney for a party, constitutes "relevant" discovery within the meaning of F.R.Civ.P. 26(b), where:

(1) the attorney is quoted in the article as commenting on the merits of the case;

(2) the party seeking discovery requested the District Court to issue an order prohibiting extrajudicial comment on the case;

(3) the party responsible for the extrajudicial comments in the article denied the need for a "gag" order on the basis that its attorney could not be shown to have made the published comments; and

(4) the newsperson being deposed refused to answer the question of whether the attorney had actually made the published quotations attributed to him?

2. Whether a non-party newsperson waives any federal common law newsperson's privilege as to source documents for a published news article, which documents reflect conversations with an attorney for a

party, by quoting that attorney's statements in the article?

3. Whether an award of expenses, including attorneys' fees, against a party which includes expenses incurred in responding to that party's appeal of a magistrate's discovery order pursuant to 28 U.S.C. §636(b)(1), unconstitutionally penalizes that party for using the process embodied in 28 U.S.C. §636(b)(1) in an attempt to preserve an atmosphere in which it could assert its seventh amendment right to a trial by jury?

LIST OF PARTIES IN THE PROCEEDING BELOW

1. Pennsylvania Dental Association (Appellant)
2. Bruce Cutler (Appellee)
3. Medical Service Association of Pennsylvania d/b/a Pennsylvania Blue Shield ("Blue Shield")
4. Donald S. Mayes, D.D.S. ("Mayes")

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COURT OPINIONS DELIVERED BELOW

Six opinions have been issued in this dispute. None of the opinions have been reported. The June 15, 1982 opinion of the United States Magistrate denying the motion of Pennsylvania Dental Association ("PDA" or "Petitioner" herein) to compel Bruce Cutler ("Cutler" or "Respondent" herein) to produce documents, and authorizing an award of attorneys' fees against PDA pursuant to F.R.Civ.P. 37(a)(4), is reproduced in Appendix E. The July 23, 1982 memorandum and order of the United States District Court for the Middle District of Pennsylvania ("District Court"), affirming the Magistrate's June 15 order, is reproduced in Appendix B. The Magistrate's September 1, 1982 order, awarding Respondent the full amount of his claimed fees ($6,475.60), is reproduced in Appendix F. The December 28, 1982 memorandum and order of the District Court, modifying the amount of the expenses awarded to Respondent, is reproduced in Appendix C. The judgment-order of the United States Court of Appeals for the Third Circuit dated October 25, 1983, affirming the two orders of the District Court, is reproduced in Appendix A. The Order of the United States Court of Appeals for the Third Circuit dated November 17, 1983, denying PDA's petition for rehearing, is reproduced at Appendix D.

STATEMENT OF JURISDICTION

The judgment-order sought to be reviewed was entered by the United States Court of Appeals for the Third Circuit on October 25, 1983. Within twenty-one days of the date of this judgment-order, PDA filed a petition for rehearing. The Court of Appeals denied this petition on November 17, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

FEDERAL RULES OF CIVIL PROCEDURE, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of "relevancy" within the meaning of F.R.Civ.P. 26(b).

The case also involves the constitutionality of awarding attorneys' fees, pursuant to F.R.Civ.P. 37(a)(4), against a party for appealing a discovery decision of a magistrate pursuant to 28 U.S.C. §636(b)(1), where the party seeking discovery is attempting to preserve an atmosphere in which it could be assured of asserting its seventh amendment right in obtaining an impartial jury.

The above rules and statute are reproduced in Appendix G.

United States constitutional provisions involved are the fifth and seventh amendments, U.S. Const. amend. V and U.S. Const. amend. VII. These provisions also are reproduced in Appendix G.

STATEMENT OF THE CASE

This petition stems from a discovery dispute which arose between PDA and Respondent, in the context of an antitrust action pending in the United States District Court for the Middle District of Pennsylvania. The underlying action is one between PDA, nine other dental groups within the Commonwealth of Pennsylvania, and five dentists on the one hand, and the Medical Service Association of Pennsylvania d/b/a Pennsylvania Blue Shield ("Blue Shield") and its Vice-President of Dental Affairs ("Mayes") on the other hand. Respondent Cutler is not a party to the underlying action.

The underlying case was initiated on October 20, 1981, when the Commonwealth of Pennsylvania ("Commonwealth") filed a complaint against PDA and eight other dental societies ("Associations"), alleging that the Associations had violated Section One of the Sherman Act, 15 U.S.C. §1, and Pennsylvania law, by encouraging dentists not to be Blue Shield participating doctors (Commonwealth Complaint, para. 6-14, 22-24). The jurisdiction of the District Court was invoked pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26, and 28 U.S.C. §1337. The filing of the Commonwealth's complaint was accompanied by widespread attendant publicity (App. at 269-94).[1]

[1] References to "App." are to the Appendix filed with Appellant PDA's Brief in the United States Court of Appeals for the Third Circuit.

On November 17, 1981, the Associations filed a third-party complaint naming, among others, Blue Shield and Mayes as Third-Party Defendants (Third Amended Third-Party Complaint, para. 4). In the third-party complaint, the Associations alleged (among other things) a broad-based conspiracy to fix prices, coerce dentists into cooperating in the price-fixing conspiracy, and to boycott "non-cooperating" dentists, in violation of Section One of the Sherman Act, 15 U.S.C. §1. The Associations also alleged that Blue Shield was attempting to monopolize and in fact was monopolizing, among other markets, the Pennsylvania market for the sale of prepaid dental care programs (Third Amended Third-Party Complaint, para. 9-35).[2]

On or about March 12, 1982, Blue Shield and Mayes filed an answer to the third-party complaint. Included in the answer was a counterclaim by Blue Shield against the Associations, an additional dental society, and five individual dentists (Blue Shield and Mayes Answer). The filing of the counterclaim, which in large part "mirrored" the original complaint of the Commonwealth (*compare* Commonwealth complaint *and* Blue Shield counterclaim), was accompanied by widespread publicity within the Middle District of Pennsylvania (App. at 269-94).

In particular, on March 14, 1982 an article written by Respondent entitled "Blue Shield Sues Dentists on Four Counts" appeared in the Harrisburg Sunday Patriot-News (a paper of general circulation in the Middle District of Pennsylvania) (App. at 292-293). In the article, Joseph Friedman ("Friedman"), attorney

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[2] See Appendix H.

for Blue Shield, is quoted as making several characterizations regarding the merits of Blue Shield's counterclaim, as well as representations as to the amounts of money involved. Specifically, Friedman was quoted as stating:

> 'Blue Shield has lost millions (of dollars) in dental insurance business but for the actions of the dentists ... I can't go beyond that.'
>
> * * * *
>
> 'We just want to stop the dentists from trying to prevent Blue Shield from uncovering overpayments ...'

(App. at 293)

On April 1, 1982, PDA filed a motion to dismiss Blue Shield's counterclaim because of the extrajudicial statements attributed by Respondent to Friedman. In this motion, PDA also requested that the District Court enter a preclusion order and/or order pursuant to M.D.Pa. Rule 121 prohibiting Blue Shield from engaging in further extrajudicial comments regarding the issues raised in the antitrust case (App. at 356-430).

In response to PDA's motion, Blue Shield denied that Friedman actually made the statements attributed to him in Respondent's March 14, 1982 article (App. at 539).

On March 19, 1982, PDA subpoenaed Respondent to appear at a deposition and to produce documents reflecting information received from the sources explicitly identified in his article (App. at 311).

On March 28, 1982, Respondent appeared for the deposition but produced no documents. Moreover, he refused to answer the fundamental question as to whether or not Friedman actually made the statements attributed to him in the article by Respondent (App. at 249-250).

On April 14, 1982, PDA filed a motion to compel Cutler to produce documents requested of Respondent in the March 19, 1982 subpoena (App. at 473).

On June 15, 1982, Magistrate Havas filed an opinion and order denying PDA's motion to compel Cutler to produce documents. The order also authorized an award of expenses against PDA for having filed the motion to compel. See Appendix E attached hereto.

The opinion of June 15, 1982, was quoted at length in the Harrisburg Patriot-News and in the Evening News on June 16, 1982 (App. at 294).

Pursuant to 28 U.S.C. §636(b)(1), PDA filed an appeal of the Magistrate's June 15 order to the District Judge.

On July 23, 1982, the District Court affirmed the Magistrate's June 15 order, on the ground that the information sought by PDA "ha[d] nothing to do with the dissemination of the allegedly prejudicial statements or of their effect on prospective jurors." See Appendix B attached hereto. In this same order, the Court upheld the Magistrate's determination that expenses should be awarded against PDA, and included in the award expenses incurred in opposition to PDA's appeal which was taken pursuant to 28 U.S.C. §636(b)(1). See Appendix B attached hereto.

PDA filed a notice of appeal of the July 23, 1982 order. The appeal was docketed in the United States Court of Appeals for the Third Circuit at No. 82-3413.

On September 1, 1982, the Magistrate ordered PDA to reimburse Counsel for Respondent in the full amount claimed of Six Thousand Four Hundred Seventy-Five Dollars and Sixty Cents ($6,475.60). See Appendix F attached hereto.

On December 28, 1982, the District Court modified the Magistrate's order and directed that Respondent's Counsel be reimbursed by PDA in the amount of Three Thousand Seven Hundred Ninety-Eight Dollars and Ten Cents ($3,798.10). See Appendix C attached hereto.

PDA filed a notice of appeal of the December 28, 1982, order. The appeal was docketed in the United States Court of Appeals for the Third Circuit at No. 83-3076.

On April 8, 1983, the Court of Appeals consolidated PDA's appeals. PDA presented them simultaneously to the Court of Appeals for its review pursuant to 28 U.S.C. §1291. *See National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595 (3d Cir. 1980).

Without oral argument, by judgment-order dated October 25, 1983, the Third Circuit Court of Appeals affirmed in all respects the District Court's orders of July 23, 1982 and December 28, 1982. Appendix A attached hereto.

Believing the judgment-order to be implicitly contrary to, among other things, the United States

Supreme Court's definition of "relevant" within the meaning of F.R.Civ.P. 26(b), PDA filed a petition for rehearing on or about November 7, 1983.

On November 17, 1983, the Court of Appeals denied PDA's petition for rehearing.

On December 2, 1983, the Court of Appeals issued an order pursuant to F.R.A.P. 41(b) staying the issuance of the certified judgment in lieu of the formal mandate until December 24, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Relevancy Issue

First, the Court should allow the writ because the judgment-order of the Court of Appeals implicitly conflicts with the definition of "relevant" within the meaning of F.R.Civ.P. 26(b) as enunciated by this Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In *Oppenheimer*, this Court stated:

> '[R]elevant' ... has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that bear on, any issue that is or may be in the case.... Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

437 U.S. at 351.

A "fact-oriented issue" had arisen in connection with PDA's motion to dismiss and request for a preclusion order and/or for an order pursuant to M.D.Pa. Rule 121. Specifically, Blue Shield had asserted, in response to PDA's requests, that no relief was appropriate because PDA could not prove that Friedman ever had uttered the prejudicial statements printed in the Cutler news article (App. at 539). In an attempt to prove this fact which Blue Shield denied, PDA subpoenaed Respondent to appear at a deposition and to produce documents reflecting communications which he had with the persons identified in his news article

(App. at 313-14). Such inquiry was directly probative of an issue which Blue Shield (in its Opposition Brief), had raised in the case, and accordingly the inquiry was "relevant" within the meaning of F.R.Civ.P. 26(b). 437 U.S. at 351. Even had Blue Shield not itself raised the issue, the issue was omnipresent as PDA was seeking to avoid unfair adverse publicity at the hands of Counsel for Blue Shield by having the Court enter a preclusion order. Proof of the need, of course, was both relevant and paramount.

On March 28, 1982, Respondent appeared for his deposition. However, he was extremely belligerent and uncooperative, and, in fact, refused to answer the primary question which was whether or not Friedman actually made the statements attributed to him in the news article (App. at 249-50).

In an attempt to resolve the matter, PDA filed a motion to compel Respondent to produce documents reflecting conversations with Friedman (if any) which served as a basis for the news article.

On June 15, 1982, the Magistrate denied PDA's motion to compel. The basis of the Magistrate's decision was that Respondent's "qualified newsperson's privilege" was not outweighed by the need of PDA for the information, in light of the fact that (in the Magistrate's view), Respondent had answered "the primary question of the Association's counsel" during the course of his deposition. Appendix E attached hereto at pp. .

On appeal to the District Court, PDA properly argued that the balancing test engaged in by the Magistrate was inappropriate insofar as Respondent

had waived whatever "qualified newsperson's privilege" he once had held as to statements made to him by Friedman, by actually quoting and attributing the statements to Friedman. *United States v. Criden*, 633 F.2d 346, 360-61 (3d Cir. 1980) (Rambo, J. concurring) (App. at 620-22). Thus, since the information sought was *not* privileged and was "relevant" within the meaning of F.R.Civ.P. 26(b), as interpreted by the United States Supreme Court in *Oppenheimer*, supra, PDA properly argued that it was entitled to the information.

In its opinion and order of July 23, 1982, the District Court did not address the constitutional issue but simply opined that the question of whether or not Friedman had actually made the statements attributed to him by Cutler had "nothing to do with the dissemination of the allegedly prejudicial statements." Thus, according to the District Court, the answer to PDA's question was irrelevant. Appendix B attached hereto.

On appeal to the Court of Appeals, PDA again urged that *Oppenheimer* mandated a contrary result. The Court of Appeals, however, affirmed the District Court's opinion and order in all respects. The basis for the Court of Appeals' affirmance is not explained in its judgment-order of October 25, 1983. Had the Court of Appeals confronted the *Oppenheimer* "relevancy" issue no affirmance would have been possible.

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2. The Newsperson's Privilege

Second, the Court should allow the writ because the Court of Appeals, in its judgment-order of October

25, 1983, implicitly and incorrectly decided an important question of federal common law, to-wit: The Court of Appeals' judgment-order of October 25, 1983, implicitly upheld the assertion of a federal common law reporters' privilege as a justification for refusing to grant PDA's motion to compel Respondent to produce documents reflecting his conversations with a source (Friedman) explicitly identified in a news article. Under the rationale expressed in a concurring opinion in *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), such a result is incorrect as a matter of federal common law.

In a concurring opinion in *Criden*, Judge Rambo noted that once the underlying rationale of the reporter's privilege disappears (by the reporter disclosing the identity of his sources), the privilege has been waived. 633 F.2d at 360-61. Clearly, Cutler has waived any privilege he once held as to statements made by Friedman, by quoting Friedman in the published news article in question.

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3. The Constitutional Questions

Finally, the Court should allow the writ because an award of attorneys' fees against PDA pursuant to F.R.Civ.P. 37(a)(4), in the circumstances of the present case, penalizes PDA for using the process embodied in 28 U.S.C. §636(b)(1) in an attempt to preserve an atmosphere in which PDA could assert its seventh amendment right to a trial by jury. As noted previously, underlying the "Cutler dispute" was PDA's request for a "gag" order; underlying that request, in turn, was PDA's desire to retain an atmosphere in

which it could obtain a fair and impartial jury trial with jurors uninfluenced by published extrajudicial statements of Blue Shield or its attorneys. At base, the "Cutler dispute" was a controversy over whether PDA's seventh amendment right could be asserted without fear of impairment by Blue Shield and its attorneys.

Not only did PDA lose its seventh amendment battle (by the District Court refusing to grant it a "gag" order), but PDA was penalized for pressing this battle, pursuant to 28 U.S.C. §636(b)(1), to the District Court level.

A criminal case decided by this Court fifteen years ago is analogous. *United States v. Jackson*, 390 U.S. 570 (1968). In *Jackson*, this Court held a provision of the Federal Kidnaping Act invalid which provided that upon a criminal defendant's waiver of his *sixth* amendment right to a jury trial he gained immunity from the death penalty. The Court stated that this provision discouraged "assertion of the Fifth Amendment right not to plead guilty" and deterred "exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581. In the present case, F.R.Civ.P. 37(a)(4) as applied penalizes PDA's assertion of its right to appeal a magistrate's decision to the District Court pursuant to 28 U.S.C. §636(b)(1) thereby implicating the fifth amendment due process clause, and penalizes an attempt by PDA to assert and protect its seventh amendment right to a trial by jury.

Under *Jackson*, such a result is unconstitutional.

Respectfully submitted,
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APPENDIX A

On Appeal From the United States District Court for the Middle District of Pennsylvania

Hon. William W. Caldwell, District Judge

Submitted under Third Circuit Rule 12(6)
October 24, 1983
Before: GIBBONS, GARTH, HIGGINBOTHAM, *Circuit Judges*

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Attorneys for Appellee,
Bruce Cutler, Nonparty Respondent

JUDGMENT ORDER

Pennsylvania Dental Association appeals from an order of the district court, affirming the order of a magistrate, denying its motion to compel discovery from Bruce Cutler, who is not a party, and who claims the protection of the Pennsylvania reporters shield law and the federal common law reporters' privilege. Pennsylvania Dental Association also appeals from a district court order awarding fees and costs in the amount of $3,798.10, pursuant to Fed. R. Civ. P. 37(a)(4). The orders are reviewable. *National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595 (3d Cir. 1980). We have considered all of the contentions of Pennsylvania Dental Association and find them to be without merit. Cutler urges that the amount of the award should be increased to the amount determined by the magistrate, but Cutler did not file a cross-appeal.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

BY THE COURT,
(s) John J. Gibbons
Circuit Judge

Attest:
(s) Sally Mrvos
Sally Mrvos, Clerk

DATED: Oct. 25 1983

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

vs.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-Claimants and Third-Party Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

MEMORANDUM AND ORDER

On June 15, 1982, United States Magistrate John Havas filed an opinion and order by which he granted Bruce Cutler's motion for a protective order and to

quash a subpoena at the same time denying the Pennsylvania Dental Association's motion to compel Mr. Cutler's testimony. In addition, the magistrate found that the motion to compel was filed without substantial justification and indicated that Cutler would be entitled to reasonable expenses in opposing the motion, as specified in Rule 37(b)(4) of the Federal Rules of Civil Procedure. The Dental Association has appealed the order, pursuant to 28 U.S.C. §636(b)(1)(A) which provides for reconsideration of a magistrate's pre-trial order where the order is "clearly erroneous" or "contrary to law."

The factual situation which gives rise to this appeal is so well understood by all parties and counsel as to require no recapitulation on our part. We do not believe that the magistrate's conclusions are clearly erroneous or contrary to law and we will therefore affirm his opinion and order.

Although it has been brought to our attention that counsel for Mr. Cutler has not complied with Local Rule 402.6 we do not believe that it would be beneficial to deny his motions for that reason at this stage of the proceedings. The rule does not itself specify a sanction for non-observance, and, while we do not question Judge Muir's judgment in fashioning the sanction he believed appropriate at an earlier point in the proceeding, we will not impose sanctions now.

We do not address the various constitutional bases for the magistrate's opinion and order, since we need look no further than the issue of relevance in order to affirm his decision. Quite simply, we do not believe

that the information sought from Mr. Cutler is relevant to the subject matter of the instant lawsuit and thus is not a permissible subject of discovery under Rule 26(b) of the Federal Rules of Civil Procedure. We are aware that the Dental Association has filed a motion to dismiss Pennsylvania Blue Shield's counterclaim based in part on alleged extrajudicial statements made by counsel for Blue Shield and reported by Mr. Cutler in the Sunday Patriot News. We do not decide or even address the motion to dismiss in our decision today: we simply hold that the information sought from Mr. Cutler is not relevent to the motion's determination, since the information sought in discovery has nothing to do with the dissemination of the allegedly prejudicial statements or of their effect on prospective jurors.

Finally, in light of the above, we affirm the magistrate's award of reasonable expenses and attorney's fees to Cutler in connection with opposing the motion to compel. This result is authorized by Rule 37(a)(4) and we do not find the magistrate's conclusion, that the motion was filed without substantial justification, to be clearly erroneous or contrary to law. We interpret this award to include expenses and fees incurred in connection with the instant appeal, and shall direct that supporting affidavits and memoranda be filed accordingly.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Date: July 23, 1982

ORDER
[Caption Omitted]

AND NOW, this 23rd day of July, 1982, the magistrate's order of June 14, 1982, is affirmed. Bruce Cutler and his counsel are directed to submit to the magistrate an affidavit and memorandum which set forth the reasonable costs and fees expended in defense of the Dental Association's motion including expenses in connection with the instant appeal. These documents are to be submitted on or before August 5, 1982, and the Dental Association may file opposing papers within ten days of the date of filing of Cutler's submissions.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

PENNSYLVANIA DENTAL ASSOCIATION, et al.,

Third-Party Plaintiffs

vs.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD; et al.,

Third-Party Defendants

MEMORANDUM

Before the court is an appeal from the magistrate's order of September 1, 1982, which awarded John C. Sullivan, Esq., counsel for Bruce Cutler, $6,475.60 in costs and fees in connection with the defense of a motion to compel production of documents filed by the Pennsylvania Dental Association. To the extent that the magistrate's order concerns

a dispositive matter: the fees and costs due Cutler's counsel (Cutler being a non-party) we agree that the magistrate should have filed a report, to which exceptions could be filed rather than an order requiring a statement of appeal.[1] We will, therefore, apply the scope of review applicable to a report, treat the statement of appeal as exceptions, and review *de novo* those matters to which exceptions have been taken.

We agree with PDA that, pursuant to our order affirming Magistrate Havas' report, fees and costs were to be awarded only in respect to the defense of the motion to compel production. Bruce Cutler's prior motions to quash the subpoena and for a protective order had been dismissed as moot by the magistrate. Nevertheless, we feel that we cannot completely discount all time spent prior to the motion to compel, since common factual and legal themes ran through all motions. In other words, conferences held with clients precipitated by the initial subpoena undoubtedly involved discussions of fact as pertinent to the defense of the motion to compel as to the motions to quash and for protective order. Similarly, although we are aware that there was not complete identity of legal issues among the motions, common legal areas did exist, and we cannot say that legal research undertaken prior to the motion to compel could not nevertheless bear upon it. Finally, although the motion to compel was ultimately denied on the basis of relevancy, we cannot flatly say that the constitutional issues were so ex-

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[1] This was the procedure followed earlier in similar matters, and should also have been used for the sake of consistency.

traneous as to be unreasonably included in the preparation for and presentation of the motion.

Despite what we have just said, we do believe certain adjustments in the claimed fee are appropriate. In view of the scope of our order which awarded fees, we will not allow any time for activities which clearly pertained solely to the motions to quash and for a protective order (such as the actual drafting and revising of these motions). We will not allow time claimed for attending the Cutler deposition. Nor will we allow time for correspondence to (as opposed to conferences with) clients, for, although this may have been inevitably incident to the discovery motions, we do not view it as *necessary* for Cutler to prevail.[2] Further, we have reduced some of the hours claimed for research to avoid duplication of effort and in recognition of the fact that, although there were issues common to all motions, extensive research on all issues was probably not reasonably necessary for the purposes of defending the motion to compel. Finally, the work descriptions submitted by Craig Staudenmaier, Sullivan's associate, is so vague as to make it impossible to determine how many hours of research or preparation of memos were

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[2] In some cases, our allocation has been imprecise, since there has oftentimes been no exact breakdowns of time spent on a particular task on a given date. For example, on May 25, 1982, the entry is "Review Brief of Pennsylvania Dental Association in Reply to Brief (Cutler's) in Opposition to Motion to Compel; Dictate letter to Client." The time for these two tasks is aggregated as .6 hours. Since we have decided that the correspondence is non-compensable we have in this case allowed .3 hours as the amount of time reasonably necessary to perform the first, compensable task.

reasonably attributable to defending the motion to compel. Although we will not disallow *all* of Mr. Staudenmaier's time, we will make the substantial adjustment necessitated by the vagueness of the entries.

In accordance with the above discussion, we will allow the following as "costs and fees:"[3]

John C. Sullivan	– 36.3 hrs. x $95.00	=	$3,448.50
Craig J. Staudenmaier	– 3 hrs. x $50.00	=	$ 150.00
Total Fees			$3,598.50
Costs			199.60
Total Due			$3,798.10

An appropriate order will be entered.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Date: December 28, 1982

[3] We conclude that the hourly rates claimed are reasonable in view of the experience of the attorneys involved.

ORDER
[Caption Omitted]

AND NOW, this 28th day of December, 1982, in accordance with the accompanying memorandum IT IS ORDERED THAT the third party plaintiffs reimburse John C. Sullivan, Esquire, counsel for Bruce Cutler, in the amount of $3,798.10.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-3413

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS PARENS PATRIAE

v.

PENNSYLVANIA DENTAL ASSOCIATION, et al.

v.

COM. OF PA.; COM. OF PA. OFFICE OF ATTORNEY GENERAL, et al.

Pennsylvania Dental Association (P.D.A.)

Appellant

No. 83-3076

PENNSYLVANIA DENTAL ASSOCIATION, et al.

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD, et al.

Pennsylvania Dental Association,

Appellant

(D. C. Civil No. 81-1187)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by the Pennsylvania Dental Association in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) John J. Gibbons
Judge

Dated: NOV 17 1983

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

v.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-Claimants and Third-Party Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

Complaint Filed 10/20/81
(Judge Caldwell)

OPINION OF MAGISTRATE

IN RE: DISCOVERY PERTAINING TO BRUCE CUTLER

Bruce Cutler is a newspaper reporter for the Patriot News Company which publishes newspapers in the Harrisburg, Pennsylvania area entitled the "Patriot," the "Evening News," and the "Sunday Patriot News." On March 14, 1982 an article appeared in the Sunday Patriot News under the heading "Blue Shield Sues Dentists on Four Antitrust Counts" which carried Cutler's byline.[1] In this article various quotes are attributed to Joseph Friedman, Attorney for Blue Shield, and, to a lesser extent, Patrick Boyle, the Press Secretary of Pennsylvania Attorney General LeRoy Zimmerman, and E. J. Shreiner, II, Vice President of Corporate and Public Affairs for Pennsylvania Blue Shield. Essentially, the subject article outlines the thrust of Blue Shield's claims in this matter, and the most significant sources of the article appear to be the pleadings and some brief quotes attributed to Friedman.

Presently under consideration are three motions involving discovery requests made by the Pennsylvania Dental Association and the other defendant, counterclaimant, third-party plaintiff Associations ("Association"), including a motion for protective order filed by Cutler, Cutler's motion to quash a subpoena duces tecum and the Association's motion to compel Cutler to produce documents. All of these motions raise the same central issue, that is whether Cutler, as a newspaper reporter, should be made to comply with the Association's discovery requests.

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[1] A copy of the subject article is attached as an exhibit to the March 29, 1982 deposition of Cutler.

Initially, it should be noted that on May 17, 1982 Cutler did appear for the taking of his deposition by the Association's counsel. However, he did not bring any notes or other documents with him which were requested by the Association's counsel. Furthermore, at the said deposition, upon the advice of his counsel, Cutler refused to answer many questions posed to him. Most of these questions really amounted to one question, that is whether the quotes attributed to Friedman in the said article were actually made by Friedman. However, a close reading of Cutler's March 29, 1982 deposition reveals (at page 12 thereof) that this question *was* really answered by Cutler, as evidenced by the following discussion:

> By Mr. Beckley (Association's Counsel):
>
> Q. Let me go at it this way: Mr. Cutler, if you would be so kind, would you look at column 3, please, of the article. I notice a quote there that says, "Blue Shield has lost millions (of dollars) in dental insurance business but for the actions of the dentists." Friedman said. "I can't go beyond that." Did Mr. Friedman, in fact, say that to you?
>
> Mr. Sullivan (Cutler's Attorney):
>
> Objection.
>
> Mr. Beckley:
>
> Your basis, Mr. Sullivan?
>
> Mr. Sullivan:
>
> On the basis that you are inquiring into confidential sources. To the extent it is published, the article speaks for itself.

A. (By Cutler) That's correct.

Mr. Beckley:

Okay. Thank you.

A. (By Cutler) Correct, Mr. Sullivan. The article speaks for itself.

On the following page of the deposition Cutler's attorney repeats that "[t]o the extent (the subject article) is published, it speaks for itself." Thus, both Cutler and his attorney *did* in essence answer the primary question posed by the Association at the deposition of March 29, 1982 by asserting that where the article in question attributes quotes to certain individuals, including Friedman, the individual who is attributed to the quote actually made the statement set forth. A fair reading of Cutler's deposition and the subject article reflects that no other conclusion is reasonable.

In light of the fact that Cutler appeared for his deposition of March 29, 1982 and answered the primary question of the Association's counsel, albeit in an indirect way, it is clear that Cutler's motion for a protective order requesting that the Court issue an order barring the requirement that he submit to deposing has been rendered moot. Likewise, to the extent that Cutler's motion to quash the Association's subpoena duces tecum contests the notice that he appear for a deposition, it, too, has been rendered moot by Cutler's actual appearance. However, to the extent that these motions question whether Cutler should be required to produce the documents requested by the Association, they remain at issue along with the Association's motion to compel.

These motions address the issue of whether Cutler should be made to produce the requested discovery or whether he is protected by the First and Fourteenth Amendments of the United States Constitution and the Pennsylvania "Shield Law", Act of 1976, P.L. 586, 42 Pa. C.S.A. §5942. However, before any substantive discussion should be initiated on the law pertinent hereto, the Association's conceded purpose for deposing Cutler should be considered. This purpose appears at page 12 of the Association's brief filed on April 12, 1982, and is set forth in the following language:

> The Association contends that Joseph Friedman, Attorney for Blue Shield, violated both the Rules of the District Court for the Middle District of Pennsylvania and the Code of Professional Responsibility established by the Supreme Court of Pennsylvania for lawyers practicing in the Commonwealth of Pennsylvania when he made the statements which appeared in the Sunday Patriot-News article. The Association attempted to depose Mr. Cutler for the primary purpose of confirming that Mr. Friedman actually made the statements and determining the manner in which Mr. Cutler was provided with the information. The information sought from Mr. Cutler is vital to the case as it affects the ability of the Association to obtain a fair trial in the Middle District and the ability of Mr. Friedman's firm to continue in the case.[2]

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[2] Local Rule of Court 118.7, which fairly well parallels Disciplinary Rule 7-107(G), is entitled "Extrajudicial Statements by Attorneys in Civil Cases," and states the following:

In *Herbert v. Lando*, 441 U.S. 153 (1978), the Supreme Court addressed the question of whether a member of the press is protected by the First Amendment from submitting to discovery which addresses the question of "actual malice" in a defamation action. In holding that the First Amendment does not so protect the press from a defamation action the Court in the following manner noted that the issue of actual malice goes to the very heart of defamation claims, claims which often involve members of the press:

> We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless

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A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(a) Evidence regarding the occurrence or transaction involved.

(b) The character, credibility, or criminal record of a party, witness, or prospective witness.

(c) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(d) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(e) Any other matter reasonably likely to interfere with a fair trial of the action.

(f) Any reference to the amount demanded, offered or involved.

> falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as Herbert. The case for making this modification is by no means clear and convincing, and we decline to accept it. In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredience of malice... (At pgs. 169, 170).

In his concurring opinion, Justice Powell again stressed that the majority's opinion in *Herbert* was based upon the crucial relevance of the evidence sought. However, Powell, by means of the following language, stressed that where information sought by discovery from members of the press is *not* so relevant a very critical analysis is required to weigh the needs of the party seeking the information and the need for some First Amendment protection for the press:

> Under present Rules the initial inquiry and enforcement of any discovery request is one of relevance. Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights a District Court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the important public interest in a free flow of news and commentary. (Citing cases). On the other hand, there also is a signifi-

> cant public interest in according two civil litigants discovery of such matters as may be genuinely relevant to their lawsuit. Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law. In performing this task, trial judges—despite the heavy burdens most of them carry—are now increasingly recognizing the "pressing need for judicial supervision." ... The Court today emphasizes that the focus must be on relevance, that the injunction of Fed. Rule Civ. Proc. 1 must be heeded, and that "district courts should not neglect their power to restrict discovery" in the interest of justice or to protect the parties from undue burden or expense. (At pgs. 179, 180).

This action involves many antitrust claims and counter-claims and comes within the meaning of the euphemistic phrase "complex litigation." Counsel for all of the parties have a great deal to do just in the realm of discovery prior to trial. Stated succinctly, the undersigned has a great deal of difficulty in understanding why in the world the Association's counsel would make Bruce Cutler part of this heated process simply because he wrote an article on this matter in which he attributes quotes to Blue Shield's counsel and simply because he felt that Blue Shield's counsel should not be commenting hereon.

Clearly, any desire to have Blue Shield's counsel removed from this action hardly is relevant to the legal and factual issues central hereto, which legal and factual issues are legion. If, as the Association's counsel professes, he has an actual concern about the propriety

of Friedman's alleged statements and "the ability of the Association to obtain a fair trial in the Middle District" he should have so advised this magistrate of these concerns and the bases therefor. Quite frankly, it is not the Association's counsel's task to determine whether Blue Shield's counsel should be allowed to continue in this case. It is the Court's decision. In respect to the Association's ability to obtain a fair trial in the Middle District, it should be noted that juries for this expansive District are chosen from all of its 32 counties and not just the area in which the Sunday Patriot News is circulated. Indeed, even assuming, *arguendo*, that all of the jurors on this matter came from the Harrisburg area, the Association's counsel's argument that it may not be able to obtain a fair trial here simply because of Cutler's article of March 14, 1982 and Friedman's alleged statements therein is totally unpersuasive. In conclusion, the very basis for which the Association's counsel seeks the subject discovery from Cutler is totally *ir*relevant to the substantive subject matter of this litigation. Again, if the Association's counsel has concerns with respect to Friedman's purported statements to the press he should so advise the Court, rather than needlessly involving an understandably troubled member of the press.

In view of the complete *lack* of relevance of the discovery sought by the Association's counsel from Cutler, the pertinent substantive law does not have to be addressed in significant detail. However, it will be reiterated that a good part of Cutler's argument for protection from the sought after discovery is based upon the Pennsylvania Shield Law, which states the following:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained from such person, in any legal proceeding, trial or investigation before any Government unit.

In *In re: Taylor*, 412 Pa. 32 (1963), the Pennsylvania Supreme Court ruled that the language of the Pennsylvania Shield Law clearly applied to "documents as well as personal informants," as reflected by the use of the general term "source of information." In *Reiley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), the Third Circuit ruled that while it was not bound to follow the Pennsylvania Shield Law, it found that it was in conformance with a qualified federal common-law privilege enjoyed by journalists and therefore deemed that it would not ignore this Pennsylvania statute. The Court further noted the following (at p. 716):

> When a privilege is grounded in constitutional policy, a "demonstrated, specific need for evidence" must be shown before it can be overcome. *United States v. Nixon*, 418 U.S. 683, 713, 94 Supreme Court 30, 90, 41 L.Ed. 2d 1039 (1974). Therefore, we must balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand.

Again, here the "need for the evidence sought" is essentially nil insofar as it pertains to the merits of this litigation. Therefore, any balancing of interests clearly leans in favor of the press' qualified First Amendment privilege. Once more, too, if the matter of the propriety of Blue Shield's counsel's actions in this litigation become an issue it will be for the Court or the Disciplinary Review Board of the Pennsylvania Bar Association to address them, and *not* the Association's counsel through some self-appointed witch hunt carried out under the guise of discovery.

In *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), the Court ruled that a television network and its employee were required to produce verbatim statements of potential government witnesses to a criminal defendant. However, once again, the Court in *Cuthbertson* stressed the need for showing the particular relevance of the evidence sought and additionally noted that in weighing the "delicate balance of interest" between the need for certain evidence and a journalist's qualified privilege not to disclose unpublished information even a criminal defendant must *first* show that he is unable to acquire such information from another source that does not enjoy the protection of this privilege. *Supra*, at page 148.

Here, the Association's counsel attempts to argue that the information which he sought from Cutler was not available from other sources. However, at a brief pretrial conference on June 9, 1982 the undersigned confronted Mr. Friedman with this matter and received a candid response. The Association's counsel's contention that the so-called "evidence" sought could only be acquired by deposing Cutler is frivolous.

An order will be issued this day granting Cutler's motion for a protective order and motion to quash the subpoena to the extent that they are not moot, and denying the Association's motion to compel Cutler to produce documents. In light of the absence of any substantial justification for the Association's motion in respect to Cutler, Rule 37(b)(4) requires that the Association pay Cutler's "reasonable expenses in opposing the motion, including attorney's fees." Therefore, the order issued this day will also direct counsel for Cutler to submit an affidavit and memorandum to the Court which set forth Cutler's reasonable attorney's fees and other costs expended in the defense of the Association's motion.

(s) John Havas
John Havas
United States Magistrate

Dated: June 14th, 1982.

ORDER
[Caption Omitted]

AND NOW, this 14th day of June, 1982, IT IS HEREBY ORDERED that Cutler's motion for a protective order and motion to quash are granted to any extent that they are not now moot, and the motion to compel of the Pennsylvania Dental Association is denied. IT IS FURTHER ORDERED that the Association's motion to compel was filed with an absence of

any "substantial justification," and therefore that Fed. Rule Civ. Proc. 37(b)(4) requires that the said Association pay Cutler's reasonable expenses in opposing the motion, including attorney's fees. Cutler and his counsel are directed to submit an affidavit and memorandum to the Court which sets forth Cutler's reasonable attorney's fees and other costs expended in the defense of the Association's motion on or before June 30, 1982.

(s) John Havas
John Havas
United States Magistrate

Dated: June 14, 1982.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

v.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-claimants, and Third-Party Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

Complaint Filed 10/20/81
(Judge Caldwell)

OPINION AND ORDER OF MAGISTRATE

RE: COUNSEL FEES FOR ATTORNEYS FOR BRUCE CUTLER

On October 20, 1981, the Commonwealth of Pennsylvania filed a Complaint against nine dental associations, charging antitrust violations under §1 of the Sherman Act, 15 U.S.C. §1. The defendant dental associations, as third-party plaintiffs, filed a third-party Complaint against the Commonwealth of Pennsylvania, the Attorney General of Pennsylvania, a deputy attorney general of Pennsylvania, Pennsylvania Blue Shield and Donald S. Mayes, D.D.S., on November 17, 1981. On March 12, 1982 Pennsylvania Blue Shield filed a Complaint and third-party counterclaim against the associations and other third-party counterclaim defendants.

On March 18 and March 19, 1982, the dental associations served notices of deposition and subpoenaes upon Bruce Cutler, a reporter for the Patriot Evening News Company. Cutler is not a party to the antitrust case. On March 26, 1982 Bruce Cutler filed a motion to quash the subpoena and objections to the inspection or copying of materials. Briefs in support of the motions and objections were filed with the Court.

Bruce Cutler appeared at a deposition hearing on March 29, 1982 and asserted rights and privileges to decline to answer questions asked of him under the Pennsylvania "Shield Law" and the First Amendment of the Constitution of the United States. On April 14, 1982, the Pennsylvania Dental Association (PDA) filed a motion to compel Bruce Cutler to produce documents.

On June 15, 1982, former United States Magistrate Havas filed an Order granting Bruce Cutler's motion to quash and motion for a protective

order. The Order of June 15, 1982 also denied PDA's motion to compel and found that the motion to compel was filed with "an absence of any substantial justification." The Order directed PDA to pay Bruce Cutler's expenses, including attorneys' fees incurred in opposing the motion. On June 25, 1982, the Pennsylvania Dental Association filed a statement of appeal from the Order of the Magistrate. By Order of July 23, 1982, the Court (Caldwell, J.) affirmed the June 15, 1982 Order of former Magistrate Havas granting Bruce Cutler's motions, dismissing PDA's motion to compel and directing PDA to pay Bruce Cutler's expenses, including reasonable attorneys' fees. The Court directed Bruce Cutler and his counsel to submit an affidavit and memorandum setting forth the expenses and fees incurred in defense of PDA's motion, including expenses incurred in connection with the appeal from the Magistrate's Order.

Counsel for Bruce Cutler has filed an affidavit in response to the Order of July 23, 1982, together with a memorandum in support thereof. The affidavit and memorandum were filed on August 5, 1982. On August 16, 1982, PDA filed a brief in opposition to the affidavit of counsel for Bruce Cutler. On August 26, 1982, Bruce Cutler filed a reply brief. On August 31, 1982, counsel for Cutler filed a supplemental affidavit.

The matter of attorneys' fees and costs for the representation of Bruce Cutler in connection with the effort of PDA to depose him and to require him to produce documents is now ripe for disposition.

In his affidavit, counsel for Bruce Cutler has stated that his hourly rate is $95.00 and that the hour-

ly rate for his associate counsel is $50.00. He requests Court approval for reimbursement in the amount of $6,475.60. Counsel for Bruce Cutler has submitted an itemized listing of the various functions that were performed on behalf of Bruce Cutler in connection with the involvement on Cutler's part in the antitrust litigation, and has stated the amounts of time that were spent in the various functions. On its face, counsel's affidavits state an adequate basis for the Court to direct rembursement in the amount requested, $6,475.60.

In their brief in opposition to the initial affidavit of counsel for Bruce Cutler, PDA has asserted various reasons why it believes that the amount claimed by counsel for Bruce Cutler is excessive and should be pared by the Court. First, it asserts that Cutler's attorney is not entitled to be compensated for hours spent in the preparation of Cutler's motion for a protective order and motion to quash subpoena and objections to inspection and copying of materials. Consistent with this assertion, it argues that all time claimed to have been spent by counsel for Cutler prior to April 27, 1982 should not be reimbursed. The undersigned fails to discern any compelling reason in this distinction that has been asserted by PDA. The time spent by counsel for Cutler had to do with precisely the same subject matter, PDA's efforts to discover certain information believed to be possessed by Cutler, and the fact that some of this time was expended in the affirmative effort to prevent the deposition and consequent possibility of contempt proceedings, while other portions of the time were spent in opposing PDA's motion to compel, is a distinction without a difference, the

undersigned believes. PDA has not set forth any substantive or persuasive argument in support of the distinction, and the undersigned simply is not persuaded by PDA's argument that there is an operative distinction.

Secondly, PDA claims that the request for reimbursement for time spent by Cutler's associate counsel, Craig J. Staudenmaier, should be denied because 7.8 hours of Staudenmaier's time was spent as of March 31, 1982. This second argument on PDA's part is essentially a reiteration of the first argument; i.e., that any time spent in connection with the motion to quash, as opposed to the motion to compel, should not be compensated. For the same reasons noted above, the undersigned does not find this argument to have any merit.

The third argument advanced by PDA is that only those hours that can reasonably be attributed to the argument that the information possessed by Cutler was not relevant to the antitrust litigation should be allowed, since the lack of relevance was the reason relied upon by the Court to deny the motion to compel and to grant the motion to quash, and that any amount of attorney time spent to brief and research issues relating to Cutler's First Amendment rights and rights under the Pennsylvania Shield Law should be disallowed. In advancing this argument, PDA cites decisions in which the Courts have ruled that the time spent by an attorney should be reimbursed only to the extent that such time was spent in an endeavor which was reasonably supportive of the claim upon which his client(s) prevailed. The undersigned believes that time spent by counsel for Cutler in researching and briefing

issues involving Cutler's First Amendment rights as a news reporter and his rights under the Pennsylvania Shield Law was time spent in a subject matter area which was reasonably supportive of the claim upon which Cutler ultimately prevailed. Although the Court ruled that the information sought from Cutler was not relevant to the subject matter of the lawsuit and granted the motion to quash and denied the motion to compel on that basis, the argument advanced by Cutler based upon constitutional and statutory rights and privileges was certainly reasonably supportive of the claim upon which he prevailed. It was not, for instance, argument devoted entirely to a different claim.

The constitutional and statutory arguments were reasonable and they were directly in support of the claim upon which Cutler prevailed. Counsel for Cutler would have been remiss to omit these arguments, no matter how strong or certain of success the argument based upon considerations of relevance appeared to be. Furthermore, the cases cited by PDA in support of its argument that the attorneys' fees for Cutler's attorneys should be reduced for time spent on the constitutional and statutory arguments do not persuade the undersigned that that result should follow. On the contrary, a review of the matters in those cases that were treated as claims other than the "claims upon which [the party] was successful" supports rather than defeats a finding in the present case that the constitutional and statutory arguments in support of Cutler were part and parcel of the claim upon which he was successful. For example, in *Baughman v. Wilson Freight Forwarding Company*, 583 F.2d 1208, 1214 (3d Cir. 1978), the claim upon which the plaintiff was suc-

cessful was an antitrust conspiracy claim. The claim upon which he was unsuccessful was a state law cause of action based upon an alleged tortious interference with business relationships. In that case, therefore, the term "claim" for purposes of an attorney's fee award, was construed to be synonymous with "cause of action." By analogy, Cutler's "claim" or cause of action, was that he should be relieved from a duty to answer the deposition questions. All arguments advanced in support of that claim were a part and parcel of the claim. PDA has cited no case where the term "claim" for purposes of an award of attorney's fees has been held to be descriptive of one particular argument, to the exclusion of all other arguments, which is ultimately viewed by the Court as the reason why a party should prevail upon a given controversy. The undersigned cannot agree with PDA that the time spent by counsel for Cutler in researching and briefing the arguments based upon constitutional and statutory rights and privileges enjoyed by Cutler should not be allowed for purposes of reimbursement.

No other objections or assertions are advanced by PDA in connection with the amount of attorneys' fees and costs claimed on behalf of Cutler.

WHEREFORE, for the foregoing reasons, it is hereby ORDERED that the Pennsylvania Dental Association shall reimburse John C. Sullivan, Esquire, counsel for Bruce Cutler, in the amount of $6,475.60.

(s) J. Andrew Smyser
J. Andrew Smyser
United States Magistrate

Dated: September 1, 1982.

APPENDIX G

VERBATIM TEXT OF RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. §636(b)(1):

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to

which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

F.R.Civ.P. 26(b)(1):

(b) Scope of Discovery. Unless Otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

F.R.Civ.P. 37(a)(4):

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially

justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

M.D.Pa. Rule 121:

Special Orders in Widely Publicized Cases.

In a case which is or is likely to be widely publicized, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

APPENDIX H

The Associations have made both Section One and Section Two claims under the Sherman Act, 15 U.S.C. §§1 and 2. These claims are clear, consistent, and coherent. The Associations' claims under Section One of the Sherman Act are outlined in more detail in the Third-Amended Thirty-Party Complaint at paragraphs 9-15. A brief summary of illustrative evidence supporting these claims can be found in the transcript of the oral argument on Blue Shield's Motion for Summary Judgment held September 21, 1983, at pp. 40 L.21–50 L.19, and in the handout materials submitted at the oral argument. See also the Associations' Letter of July 21, 1983 and Appendix.

The Associations' claims under Section Two of the Sherman Act are found in more detail at paragraphs 20-39 of the Third-Amended Third-Party Complaint and at pages 106-113 of the Associations' Brief in Opposition to Blue Shield's Motion for Summary Judgment ("Opposition Brief"). Some illustrative evidence supporting these claims can be found in the Comanor Affidavit attached as Exhibit "B" of the Appendix to the Opposition Brief, the letter of July 21, 1983 to the Court (with Appendix), and in the handout materials submitted at the oral argument on September 21, 1983.

Briefly, the Associations' claims (with some illustrative evidence) may be summarized *in part* as follows:

Section One of the Sherman Act

A. *Price-Fixing*

1. Blue Shield and at least some participating dentists have conspired to create and maintain a 10% differential between current *charges* to all patients and Blue Shield *allowances* for Blue Shield patients. (Third-Party Plaintiffs' Pretrial Order (PTO), at pp. 13-19, para. 34-67.)

2. This conspiracy occurs, among other ways, through the operations of the dentist majority on the Dental Affairs Committee, whose recommendations are regularly accepted by Blue Shield's Board of Directors. (Dr. Callahan Depo. of 3/9/83, Ex. 3 and pp. 77-79, 121-123; Dr. Armitage Depo. of 4/8/83, at pp. 24-25; PTO at pp. 17-19, para. 56-67.) It also occurs through the various actions including the freezing of profiles of the dentist dominated Dental Review Committee which often acts autonomously of the Board of Directors. (Dr. Chialastri Depo. of 3/17/83, Ex. 16; Harbold Depo. of 3/11/83, at pp. 454-468.) Blue Shield also consults regularly with practicing dentists known as advisors about Blue Shield payments to other dentists.

3. The "usual" charge screen, first implemented in late 1974 (Etnoyer Depo. of 3/4/83, Ex. 15) furthers the 10% differential goal (see Edmiston Depo. of 3/15/83, at pp. 142-143). It causes practically all dentists to encounter differences between their current charges to all patients and the allowances Blue Shield pays on at least a substantial minority of the services the dentists perform (Blue Shield Payout Study dated 8/9/82, document stamped 356737 and 356738.)

4. The overall operation of the 10% differential (including both the "usual" and "customary" charge screens), leads Blue Shield to pay a lower price to practically all participating dentists on at least a minority of the services they perform for Blue Shield subscribers than the price other patients pay these dentists. (Comanor Affidavit attached as Exhibit "B" to Appendix Brief, at para. 22-24.)

5. The price-fixing also works in another way. Besides the conspiracy described above to ensure that Blue Shield obtains a 10% discount, Blue Shield further conspires with dentists in discussions to "educate" them as to the appropriate amount to charge their patients. (Hajjar Depo. of 12/3/82, at pp. 16-17, Memorandum of Terrence E. Bowling attached as Ex. "H" to Opposition Brief Appendix.) Because of Blue Shield's requirement that the dentists charge all patients the same, this conspiracy affects the price which dentists charge to non-Blue Shield patients as well.

B. *Boycott*

6. Blue Shield, at least some participating dentists, and others, have conspired to engage in a series of practices designed to induce patients away from non-participating, non-cooperating dentists and to coerce these dentists into becoming Blue Shield participating doctors. (Zubrow Letter attached as Ex. "O" to Opposition Brief Appendix; Bowling Depo. of 1/18/83, Ex. 5, and pp. 65-66; Dr. Zielinski, Depo. of 3/11/83, at pp. 125-130.) These practices include, among others, the freezing of profiles, the refusal to grant "excepted" dentist status to non-participating dentists, the use of different claim forms for par-

ticipating and non-participating dentists, the publication of advertisements advising patients to seek the services of participating dentists only, and the printing of misleading messages on Blue Shield Explanation of Benefits forms which are sent to the patients of non-participating dentists. These practices began approximately in 1973 through 1975—with the publication of *A Shopper's Guide to Dentistry* (Denenberg Depo. of 6/3/83, Ex. 8), and *What to Ask Your Dentist* (Mayes Depo. of 4/5/82, Ex. 17), and with the creation of the Dental Policy Committee (PTO at pp. 11-13, para. 23-35) the 10% differential (PTO at pp. 16-18 para. 52-64) and the "usual" charge screen (Etnoyer Depo. of 3/15/83, Ex. 15)—and continue to the present.

C. *DentalPLUS*

7. Blue Shield, Mayes, dentists participating in Blue Shield's DentalPLUS plan, and others, have conspired to create and maintain (Mayes 6/14/83 Depo. at pp. 973 L.16—980 L.22), very stringent exclusionary criteria designed to artificially limit the supply of dentists able to perform services in the DentalPLUS plan. (Memorandum of Robert B. Edmiston attached as Exhibit "G" to Letter of July 21, 1983; Affidavit of D. Walter Cohen, D.D.S., attached as Exhibit "H" to Letter of July 21, 1983.) This effectively boycotts a number of dentists who would be able to perform services in the plan but have been excluded by these arbitrary criteria.

Section Two of the Sherman Act

In the course of these proceedings, the Associations have defined distinct statewide markets in which

Blue Shield's anticompetitive activities occur. These markets, among others, are as follows:

> MARKET II – the market for the purchase of bulk dental services from individual dental firms;
>
> MARKET IIA – the market for the purchase of individual dental services from individual dental firms; and
>
> MARKET I – the market for the sale of prepaid dental care programs to group purchasers (MARKET IA is the submarket for the sale of prepaid service benefit dental care programs to group purchasers).

See Exhibits "A" and "B" to Appendix to Opposition Brief.*

Individual dental firms are sellers in MARKET II (where Blue Shield is one of two buyers) and in MARKET IIA. (Comanor Affidavit at para 14-29.) Blue Shield is a seller in MARKET I. Briefly, the Associations' claims may be summarized *in part* as follows:

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* Dr. Comanor's Affidavit, which has been the subject of much discussion in connection with the Associations' claims under Section Two of the Sherman Act, explains his basic methodology and sets forth the facts to which he applied this methodology in order to define these three distinct markets. See Comanor Affidavit at para. 15-20 (facts show that cross-elasticities of supply and demand between MARKET II and MARKET IIA are low, and therefore, these are two distinct markets). *See Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 912 n.15 (9th Cir. 1981); *Biehler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980).

1. In MARKET II, Blue Shield has a 91% market share. (Letter of July 21, 1983, at para. 39, and documents referred to therein; Comanor Affidavit at para. 3, 21.)

2. Blue Shield has monopsony power in MARKET II. (Comanor Affidavit at para. 14-29.)

3. Blue Shield has engaged in anticompetitive acts in this market. (See the claims under "Section One of the Sherman Act.") For example, Blue Shield's operation of the 10% differential leads Blue Shield to pay a lower than competitive price in MARKET II (Comanor Affidavit at para. 22-24) to practically all participating dentists on at least a minority of the services which they perform for Blue Shield subscribers. (Blue Shield Payout Study dated 8/9/82, Document stamped 356737 and 356738.)

4. Participating dentists accept Blue Shield's discounted payments as full payment because of Blue Shield's monopsonistic practices designed to exclude them from MARKET II if they do not. (Arzt Depo. of 3/16/83 at pp. 68-72; Zielinski Depo. 3/11/83 at pp. 125-130; Comanor Affidavit at para. 23-24, 26-27.)

5. In MARKET I, there is a dangerous probability that Blue Shield will succeed in attaining monopoly power. Blue Shield is already the largest seller in MARKET I. Its market share was 19% in 1977 (Ex. "I" to Opposition Brief Appendix), and it now admits a market share of at least 32% to 35%. (Kennedy Depo. of 5/3/83, at pp. 433-434.)

6. Blue Shield has engaged in anticompetitive acts directed toward monopolizing MARKET I. (See the discussion of the preceding claims under "Section One of the Sherman Act.")

No. 83-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENNSYLVANIA DENTAL ASSOCIATION,
Petitioner,

—against—

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD;

BRUCE CUTLER,
Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

This case began as a federal antitrust matter under the Sherman Act. The issues raised by the Petition are collateral to that action as they involve the Petitioner's attempt to compel the testimony of a non-party newsman who wrote an article concerning the antitrust litigation, which article contained statements attributed to various persons involved in the litigation, including counsel opposing the Petitioner. The article was published in a newspaper of general circulation. The Court below denied the Motion to Compel and awarded the Respondent expenses, including counsel fees. The precise questions presented are:

1. In a non-diversity jurisdiction civil action, did the District Court err in denying a Motion to Compel testimony from a non-party newsman who asserted his qualified constitutional journalistic privilege.

2. Did the District Court err in awarding attorney's fees under Rule 37(a)(4) of the Federal Rules of Civil Procedure for time expended in resisting the efforts to compel testimony and included within the compensable time, efforts expended on constitutional arguments, notwithstanding the court dismissed the Motion to Compel on the basis of "relevancy."

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CONSTITUTIONAL AND STATUTORY AUTHORITY AND RULE OF PROCEDURE INVOLVED

The constitutional provision involved in this case is the First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This provision is made applicable to the states by Section 1 of the Fourteenth Amendment, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also involved is Pa. C.S.A. Title 42, § 5942(a) (Purdon 1982) which provides:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

The procedure here involved relates to:

28 U.S.C. § 636(b)(1):

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a Judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A Judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a Judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a Judge of the court proposed findings of fact and recommendations for the disposition, by a Judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A Judge of the court shall make a de novo determination of those portions of the report or

specified proposed findings or recommendations to which objection is made. A Judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

The Rules of Civil Procedure referred to below include:

F.R. Civ. P. 26(b)(1):

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

And

F.R. Civ. P. 37(a)(4):

. . . .

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion,

including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

REASONS FOR DENYING THE WRIT

1. The District Court's Order denying PDA's Motion to Compel disclosure of privileged information was in accord with applicable Pennsylvania and Federal Law.

A. THE PENNSYLVANIA NEWSGATHERER'S "SHIELD LAW" AND ITS LIBERAL CONSTRUCTION BY THE PENNSYLVANIA SUPREME COURT HAVE BEEN ADOPTED AS FEDERAL LAW IN THE THIRD CIRCUIT.

Cutler as a reporter employed by the *Sunday Patriot News*, a newspaper of general circulation in Harrisburg, Pennsylvania, is a person entitled to the "shield" and protection afforded newsgatherers by Pennsylvania's Shield Law, 42 Pa. C.S.A. 5942. In the proceeding below, Cutler asserted his right to refuse to reveal documents and confidential information obtained by him in the course of preparations for the writing and publishing of the news article referred to in the Subpoenas served upon him. The law reads as follows:

> –No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

The Supreme Court of Pennsylvania has expansively construed the word "sources" under the Pennsylvania Shield Law.

> We believe the language of the statute is clear. The common and approved meaning or usage of the words 'source of information' includes documents as well as personal informants.

In re: Taylor, 412 Pa. 32, 193 A.2d 181, 7 ALR 3d 580 (1963).

The Third Circuit of Appeals has expressly accepted as Federal Law, the liberal construction of the Shield Law as provided by *In re: Taylor, supra*, and noted that such privilege is not limited to "confidential" materials.

> Even state law does not militate in favor of disclosure of the requested information, for the pertinent law of the Commonwealth of Pennsylvania provides that all of a newsman's "sources" (the word having been defined in *In re: Taylor*, 412 Pa. 32, 193 A.2d 181 (1963), to encompass persons and documents which are privileged, **without reference to their confidentiality.** (Emphasis supplied.)
>
> *Altemose Construction v. Building & Construction Trades*, 443 F. Supp. 489, 491 (1977).
>
> The Federal Courts in adopting the Pennsylvania Shield Law as Federal Law have made clear that the law functions without attenuation of any other person's constitutional rights.
>
> *Mazzella v. Phila. Newspapers, Inc.*, 479 F. Supp. 523 at 528 (E.D. N.Y. 1979) applying Pennsylvania Law. See also *LAL v. CBS, Inc.*, 551 F. Supp. 364 (E.D. Pa. 1982).

The synthesis of the Pennsylvania Shield Law and Federal Law has been articulated several times by the Third Circuit Court:

> In *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979), the Court stated:
>
> > The interests behind the Pennsylvania statute and the federal common law in this regard are congruent, each stemming from an independent base of authority but both leading to protection of the vital communication role played by the press in a free society. (Ibid at 715).

Accord *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3rd Cir. 1980).

B. A FORCED INTRUSION UPON THE CONSTITUTIONAL JOURNALISTIC PRIVILEGE WOULD CAUSE A CHILL UPON THE FREE FLOW OF INFORMATION TO THE PUBLIC AND SHOULD ONLY BE PERMITTED IN THE FACE OF OVER-RIDING AND COUNTERVAILING CONSTITUTIONAL INTERESTS.

The constitutional protection afforded newsgatherers under the First and Fourteenth Amendments of the United States Constitution protects journalists from compulsory disclosure in non-criminal and non-party discovery efforts, as to do otherwise would cause a "chilling effect upon the flow of information to the press and to the public." See *Loadholtz v. Fields,* 389 F. Supp. 1299 (M.D. Fla. 1975) where the Court in quashing the subpoena said:

> Mr. Prevatt [the reporter] opposes the motion [to compel discovery] on the ground that requiring him to attend the deposition and produce unpublished as well as published documents received and developed by him in the course of his duties as a reporter necessarily has a "chilling effect" upon his function as a reporter and upon the flow of information to the general public in violation of the First and Fourteenth Amendment. This Court agrees. (Ibid at 1300).

The *Loadholtz* Opinion was cited with approval by the Third Circuit in *Riley,* Ibid at 717.

The "First Amendment" of the Constitution of the United States which safeguards freedom of the press is a "preferred" constitutional freedom, and therefore possible adverse effects upon First Amendment rights are to be accorded paramount consideration when weighing a request for compulsory disclosure by newsgatherers of privileged material. The Federal Courts when faced with this issue have determined that absent an overriding countervailing constitutional right, a motion requiring a journalist to disclose his work product should be dismissed.

See *Baker v. F & F Investment*, (2nd Cir. 1972), 470 F.2d 778, cert, den. 411 U.S. 966, where Circuit Judge Kaufman affirmed the District Court's refusal to require a reporter to disclose the identity of a "blockbuster" in a federal class action under the Federal Civil Rights Act on behalf of black citizens in the Chicago area. In *Baker*, the Court was specifically asked to extend the limited principal of the *Branzburg v. Hayes*, 408 U.S. 665 (1972) which required journalistic testimony in a grand jury investigation. There the Court within the context of a civil right action refused to extend the impact of the ruling to compel such disclosure.

Even *Branzburg*, which defined an exception to the Constitutional journalist privilege did not strip away all journalistic privileges but expressly preserved them. See *Branzburg*, ibid at 708.

Since the *Branzburg* decision, the Federal Courts have repeatedly determined that certain unpublished statements and documents held undisclosed by the media newsmen continue to retain their First Amendment privilege, thus barring disclosure in a criminal proceeding notwithstanding a demand for production by the defendant or prosecutor.

U.S. v. Cuthbertson, 630 F.2d (139 (3rd Cir. 1980) cert. den. 449 U.S. 1126

U.S. v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982)

U.S. v. Orsini, 424 F. Supp. 229, aff'd 559 F.2d 1206 (2nd Cir. 1977) cert. den., 434 U.S. 997

U.S. v. Homer, 411 F. Supp. 972, aff'd 545 F.2d 864 (3rd Cir. 1976) cert. den. 431 U.S. 954

A fortiori, if a newsman's First Amendment privilege is permitted to prevail when balanced against a prosecutor's powers or a defendant's constitutional rights in a criminal proceeding, a First Amendment privilege should always prevail in a civil proceeding, as the standards for evaluation of the countervailing rights are radically disparate. The civil litigant's discovery

demand must yield to the constitutional privilege accorded newsgatherers under the First Amendment.

C. THE INFORMATION DEMANDED OF RESPONDENT CUTLER, IN CONTRAVENTION OF HIS QUALIFIED CONSTITUTIONAL PRIVILEGE, IS NOT RELEVANT TO THE ISSUES OF AN ANTITRUST CASE AND AS SUCH THE DEMAND IS BARRED UNDER APPLICABLE FEDERAL LAW AND RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

PDA's discovery efforts directed at Cutler is collateral to the basic antitrust issues the District Court must decide. Its purpose was to find some corroboration for their contention that one of the counsel of record made a professional gaffe.

The following is an excerpt from the brief filed with the District Court on April 12, 1982, it is the original description of their intent. Note that Joseph Friedman, Esquire is counsel for Medical Service Association of Pennsylvania d/b/a Pennsylvania Blue Shield.

> The information sought from Mr. Cutler **is vital** to the case as it affects the ability of the Association to obtain a fair trial in the Middle District and **the ability of Mr. Friedman's firm to continue in the case.** (Emphasis supplied.) (page 12 of Brief)

Case law and Federal Rule 26 protect against such tangential procedural exercises.

See *Herbert v. Lando*, 99 S. Ct. 1635, 441 U.S. 153, 60 L. Ed. 2d 115 (1979) which discusses the standards to be applied in discovery efforts when countervailing First Amendment rights are present. There Justice Powell in his concurring Opinion stated:

> Whatever standard may be appropriate in other types of cases, where a discovery demand arguably impinges upon First Amendment Rights, a District

> Court should measure the **degree of relevance** required in light of both the private needs of the parties and the public concerns implicated. (Ibid at 179) (Emphasis supplied.)

Justice White in the same case writing for the majority after citing Rule 26 suggested:

> . . . with this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process. (at 177)

Justice Marshall in his dissent in the *Herbert v. Lando* case, *supra* made the same suggestion but in a stronger and in relation to the instant matter, immediately pertinent:

> I would require that District Courts superintend pretrial disclosure in such litigation so as to protect the press from unnecessary protracted **or tangential inquiry**. (Ibid at 206) (Emphasis supplied.)

PDA argues in their Petition on "The Relevancy Issue" that the Circuit Court of Appeals' Judgment Order implicitly conflicts with the definition of "relevant" within the meaning of Federal Rule of Civil Procedure 26(b) as enunciated by this Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) when it affirmed the District Court's determination "The District Court determined that the information sought from Mr. Cutler was not relevant to the Motion to Dismiss Pennsylvania Blue Shield's Counterclaim based in part on alleged extrajudicial statements made by counsel for Blue Shield and reported by Mr. Cutler in the *Sunday Patriot News*. The District Court concluded the information sought in discovery had nothing to do with the dissemination of the allegedly prejudicial statements or their effect on prospective jurors."

Oppenheimer, notwithstanding its affirmance of the broad sweep of discoverable matters under Rule 26(b)(1), expressly acknowledges that the Rule has limitations and that those limitations are required for proper judicial administration.

> At the same time, "discovery like all matters of procedure, has ultimate and necessary boundries." [Hickman v. Taylor 329 U.S. 495] at 507, 67 S. Ct. at 392. Discovery of matter not "reasonably calculated to lead to the discovery of admissible evidence" is not within the scope of Rule 26(b)(1). Oppenheimer at 352.

It is urged by the Respondent Cutler that the District Court's order carefully considered the issue of "relevancy" under Rule 26(b)(1) and properly determined that the information sought had no probative value and therefore was inadmissible for the purpose intended by PDA.

The purpose for which the discovery was undertaken by PDA and directed at Cutler marks it as outside the spectrum of permissible discovery as the information sought is clearly "privileged" as that term is used in Rule 26(b)(1).

Rule 501 of the Federal Rules of Evidence provides for the adoption of the State Law of the forum relating to "privilege." See Conference Committee Notes to Federal Rule of Evidence 501.

As noted earlier, the Third Circuit Court has on several occasions expressly adopted the Pennsylvania "Shield Law" relating to a newsman's "privilege" as federal law.

Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979).

Altemose Construction v. Building & Construction Trades, 443 F. Supp. 489, 491 (3rd Cir. 1977).

The Courts below having adopted the statutory and State Court determination of "privilege" as Federal Law it properly follows that under Federal Rule of Civil Procedure 26(b)(1) the Court could properly bar PDA from requiring the Respondent Cutler to reveal privileged information as it is, inadmissible evidence under Rule 501 of the Federal Rules of Evidence.

PDA in its Petition cite *U.S. v. Criden*, 633 F.2d 346 (3rd Cir. 1980) cert. den. sub. nom., *Schaffer v. U.S.*, 449 U.S.

1113. *Criden* is a criminal proceeding, frequently cited for the three prerequisites the Courts will look for, before impinging upon a newsman's First Amendment privileges.

> *Riley* isolated three criteria that must be met before a reporter can be compelled to disclose a confidential source. *Riley*, 612 F.2d at 717. First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the Court that the information sought is crucial to the claim. Ibid at 358.

In applying the "Criden Criteria" to the instant matter consider:

> (i) For self-avowed purposes, PDA has not moved to take the deposition of anyone other than the Respondent, Cutler.
>
> (ii) PDA admits that the information is available elsewhere – it takes two to make a conversation. Clearly, PDA has not exhausted other sources – in fact it has made no attempt to do so.
>
> (iii) How crucial is Cutler's privileged information to an antitrust action involving the various dental associations and third-party health insurance for dental care for the public?

But on the other hand, consider the chilling effect an order requiring involuntary disclosure would have on the reporting of a multi-party case involving the Commonwealth of Pennsylvania, Blue Shield, various dental and medical associations, millions of consumers and millions of dollars in premiums and fees. Is the public better served by providing articles concerning this type of litigation – or should PDA's tangential inquiry be allowed to intrude on a First Amendment Privilege, which privilege is buttressed by a specific Pennsylvania statute, adopted as Federal Law?

D. THE SUBSTANTIAL WEIGHT OF AUTHORITY SUPPORTS THE PROPOSITION THAT A NEWSGATHERER'S FIRST AMENDMENT PRIVILEGE WILL BE DIMINISHED BY COMPULSORY DISCLOSURE IN CIVIL ACTIONS AND THEREFORE IT WILL NOT BE COMPELLED BY COURT ORDER.

PDA has cited no authority arising out of a civil action in which a non-party newsgatherer was required to involuntarily disclose privileged information. Courts across the United States have recognized the newsgathers' qualified privilege in relation to efforts to compel testimony in both civil and criminal proceedings. The following is a partial listing of recent cases so holding:

Democratic Nat'l Com. v. McCord, 356 F. Supp. 1394 (D.C. D.C. 1975) Non-party reporter. Motions to Quash Subpoena granted.

Gulliver's Periodicals v. Chas Levy, 455 F. Supp. 1197 1200-04 (N.D. Ill. 1978) non-party reporter, antitrust case – no disclosure required.

Apicella v. McNeil Labs, Inc., 66 FRD 78 (E.D. N.Y. 1978) Non-party publisher. Motion to Compel dismissed.

Zerilli v. Bell, 458 F. Supp. 26, (D.C. D.C. 1978) Non-party reporter. Motion to Compel dismissed.

Citicorp v. Interbank Card, 4 Med. L. Rep. (BNA) 1429 (S.D. N.Y. 1978) non-party reporter, antitrust action – no disclosure required.

Loadholtz v. Fields, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975) – no disclosure required – nonconfidential non-party reporter.

Silkwood v. Kerr McGee, 563 F.2d 433 (10th Cir. 1977) – non-party – no disclosure required.

Mize v. McGraw Hill, Inc., 82 FRD 475 (S.D. Tex. 1979) party defendant reporter – no disclosure required – no relevancy.

Altemose Construction Co. v. Building & Construction Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977) non-party – not required to disclose nonconfidential information.

Coira v. Depoo Hospital, 48 Fla. Supp. 105 non-party reporters absolutely privileged.

Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979) non-party – no disclosure required – contempt finding rev'd.

Dallas Oil & Gas v. Mouer, 533 S.W. 2d 70 (Tex. 1976) non-party newspaper. Motion to Compel denied.

Mazzella v. Philadelphia News, 479 F. Supp. 523 (E.D. N.Y. 1979) applying Pennsylvania Law held confidentiality was protected notwithstanding newspaper and reporter were defendants in a libel action.

Baker v. F & F Investments, 470 F.2d 778 (2nd Cir. 1972) non-party – no disclosure required.

U.S. v. Blanton, 534 F. Supp. (S.D. Fla. 1982) Non-party reporter, criminal proceeding, subpoena quashed, no confidential source or information involved.

U.S. v. Orsini, 424 F. Supp. 229, aff'd 559 F.2d 1206 (2nd Cir. 1977) cert. den. 434 U.S. 997, non-party reporter, criminal proceeding, confidential sources protected by First Amendment; and material sought was irrelevant.

Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972) contempt citation against reporters who refused to answer questions before grand jury dismissed on basis that government failed to establish that its interests were legitimate and compelled infringement of First Amendment rights of reporters.

E. THE RESPONDENT NEWSMAN DID NOT WAIVE ANY CONSTITUTIONAL OR STATUTORY RIGHT TO PRIVILEGED CONFIDENTIALITY FOR MATERIALS AND INFORMATION GATHERED IN PREPARATION FOR THE ARTICLE WHICH WAS PUBLISHED.

PDA claims Cutler waived his privilege against involuntary disclosure by publishing names of various persons with attribution of statements. The law of Pennsylvania, as adopted by the Third Circuit, disagrees with that conclusion. See *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3rd Cir. 1980), where the same argument was made and rejected by the Court at page 40.

> Similarly, even though the primary source of the Mills interview is known, discovery of the outtakes may reveal the identity of secondary sources. Inasmuch as Taylor [412 Pa. at 40] protects all non-published portions of a source's statement, we hold that the outtakes of the Mills interview are protected even though the identity of the primary source of information is known. Accordingly, the District Court did not err in denying *Steak's* Motion to obtain the outtakes. Pennsylvania's decision to protect previously unpublished "sources of information" from compulsory disclosure is an important matter of state policy that we are bound to observe in the course of adjudicating the questions of state law.

The same argument urged by PDA was made by the Commonwealth of Pennsylvania *In re: Taylor*, 412 Pa. 32 (1963) and rejected by the Court.

The same type argument was also rejected by the Federal District Courts in *Mazzella supra* at 529 and *LAL v. CBS, Inc.*, 551 F. Supp. 364 at 366 (E.D. Pa. 1982) after citing *Steaks Unlimited v. Deaner*, 623 F.2d 264 (3rd Cir. 1980).

2. The District Court acted properly in affirming the Federal Magistrate's Order awarding the Respondent Counsel Fees under F.R.Civ.P. 37(2)(4) after denying Petitioner's Motion to Compel.

A. SCOPE OF REVIEW UNDER 28 U.S.C. 636(b)(1)(A) IS LIMITED TO MATTERS CLEARLY ERRONEOUS AND CONTRARY TO LAW.

The question of whether the amount of counsel fees awarded by the Magistrate and approved as modified by the District Court was proper, divides into two issues: (a) the scope of review under 28 U.S.C. 636(b)(1)(A) on an Appeal from a Magistrate's Order; and (b) "reasonableness" of fees under Rule 37(a)(4) as the Magistrate's pre-trial discovery Order here in question directed PDA to reimburse Cutler's counsel for fees and costs in the amount of Six Thousand Four Hundred Seventy-Five and 60/100 ($6,475.60) Dollars. On Appeal of the Magistrate's Order to the District Court the District Judge stated: "we will therefore apply the scope of review applicable to a report, treat the statement of appeal as exceptions and review **de novo** those matters to which exceptions have been taken." The District Court then proceeded to modify the Order to reimburse by reducing the amount to Three Thousand Seven Hundred Ninety-Eight and 10/100 ($3,798.10) Dollars.

Applicable law limits the scope of review within the context of a Rule 37(a)(4) proceeding to those portions of the Magistrate's Order which are "clearly erroneous and contrary to law" and not subject to a review *de novo.* Authorities speaking on the subject indicate that the scope of review is not a flexible variant but a matter fixed by statute.

28 U.S.C. § 636(b)(1)(A) reads in part:

> A judge of the court may reconsider any pre-trial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

To complete the scheme providing for greater utilization of federal magistrates to relieve the burden heaped upon Federal District Judges the congress limited appeals **de novo** to "recommendations" made under § 636(b)(1)(B).

See AmJur 2d, Vol. 32, § 136 where the noted authority states:

> A trial judge may properly assign discovery motions to magistrates. In the case of a discovery motion, the decision of the magistrate is final, because 28 U.S.C. § 636(b)(1)(A) does give a magistrate the power to hear and determine such a motion. Such a final decision by a magistrate can only be overturned by a trial court if it is clearly erroneous or contrary to law or if the magistrate abused his discretion in entering the order.

Rulings made by United States Magistrates on non-dispositive pre-trial matter are subject to reconsideration by the District Court and may be set aside only if found to be clearly erroneous in fact or contrary to law.

> *U.S. v. Raddatz*, 447 U.S. 667, 673 (1980), *Princotta v. N.E. Tel. & Tel. Co., Inc.*, 532 F. Supp. 1009, (D.C. Mass. 1982), *Federal Deposit Ins. Corp. v. U.S.*, 527 F. Supp. 942 (D.C. W. Va. 1981), *Merritt v. Int. Bros. of Boilermakers, 649 F.2d 1013 (1st Cir. 1981), Pascale v. G.D. Searles & Co.*, 90 FRD 55 (D.C. R.I. 1981)

A pre-trial discovery order of a Magistrate under § 636(b)(1)(A) is subject to the same standard of review as are District Court Orders, i.e. they are to be accepted unless clearly erroneous.

> *DeCosta v. CBS*, 520 F.2d 499 (1st Cir. 1975) cert. den. 423 U.S. 1073.

The award of attorney's fees and costs under a Rule 37(a)(4) proceeding is not a matter for "disposition" as that term is used in § 636(b)(1)(B).

> Since discovery matters are by definition pre-trial matters, the Magistrate possessed authority under 28 U.S.C. § 636(b)(1)(A) to assess reasonable attorney's fees under Rule 37(a)(4) even after judgment in the case. *Merritt v. Int. Bros., supra* at 1018.

It should be noted that PDA filed no "objections" to the Magistrate's Order nor did it ask for a "review *de novo*," they merely entered an appeal. See in this regard *Sherrell Perfumes, Inc. v. Revlon, Inc.*, 77 FRD 705 at 707 (D.C. N.Y. 1977) where the Court refused to grant a Motion for review *de novo* of Magistrate's Order issuing a Protective Order. The Court stated that such pre-trial orders can only be reconsidered if it is shown "the order is clearly erroneous or contrary to law" citing as authority, 28 U.S.C. 636(b)(1)(A).

For a case directly on point, see *Coates v. Johnson and Johnson*, 85 FRD 731 (N.D. Ill. 1980) where the Magistrate awarded the defendant, counsel fees and costs as provided under Rule 37(a)(4) for the successful defense of a Motion to Compel. The plaintiff sought to appeal such award to the District Court. The Court in refusing to disturb the Magistrate's Order stated:

> Such an award is by nature discretionary and after a review of the record this Court does not find the relief to have been "clearly erroneous" [citing in a footnote, 28 U.S.C. 636(b)(1)(A).]

B. REASONABLE COUNSEL FEES UNDER RULE 37(a)(4) INCLUDES FEES CHARGED FOR TIME DEVOTED TO RELEVANT ISSUES BUT NOT UTILIZED BY THE COURT IN DENYING A MOTION TO COMPEL.

The attorney's fees and expenses originally ordered by the Magistrate to be paid the Respondent Cutler by PDA are not "clearly erroneous or contrary to law" but are "reasonable" as required by Rule 37(a)(4) of the Federal Rules of Civil Procedure.

Rule 37(a)(4) provides in part:

. . . .

> If the Motion [to compel discovery] is denied, the Court shall after opportunity for hearing, require the moving party . . . to pay to . . . the deponent who opposed the motion the reasonable expenses incurred in opposing the Motion, including attorney's fee, unless the Court finds that the making of the Motion was substantially justified or that other circumstances make an award of expenses unjust.

Prior to modifying the amount of counsel fees, the District Court determined that the Motion to Compel filed under Rule 37 by PDA was "without substantial justification".[1]

PDA, in their "full court press" attack upon the fees and expenses incurred by Cutler in opposing efforts to strip away his constitutional and statutory privilege, claim the hours listed by Cutler's counsel do not reflect hours reasonably supportive of the claim on which Cutler prevailed.

What is "reasonable" in reference to the award of counsel fees? In this day of ever increasing awards of attorney's fees to the prevailing party, the question of "reasonableness" has troubled the Courts and commentators alike. See 122 Univ. Penn L. Rev. 702 which in its discussion of: "The Vagaries of 'Reasonableness' in Awarding Attorney's Fees" states:

> The trial judges have frequently awarded fees without ever stating the criteria by which those fees were calculated, and appellate review of trial court awards have been as narrow as the trial court discretion has been broad. The clearest guiding principle that has emerged is that the awards cannot be calculated by any simple formula.

Reason and logic require that all time reasonably expended in assisting a non-party witness protect his reporter's qualified privilege should be compensable. The time expended should not be subject to the arbitrary reductions urged by PDA.

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1 Appendix p. 5a.

Courts have frequently ordered the payment of legal fees for all services performed and have not limited compensable services to those arguments which prevailed. See the following decisions determining services as compensable.

a) tasks undertaken prior to commencement of litigation – *Thomas v. Honeybrook Mines*, 428 F.2d 981 (3rd Cir. 1970);

b) settlement negotiations – *Lindy Bros. v. Am. Rad.*, 540 F.2d 102 (3rd Cir. 1976);

c) review and editing – *In re: Equity Funding Litigation*, 438 F.2d 1303 (C.D. Cal. 1977);

d) conference with counsel – *Palmigiano v. Garrahy*, 466 F. Supp. 732 (D.C. R.I. 1979);

e) *David v. Scranton*, 633 F.2d 676 (3rd Cir. 1980), time expended in prosecuting a fee application.

f) *Johnny Pflocks, Inc. v. Firestone Tire & Rubber*, 634 F.2d 1215 (9th Cir. 1980) where the Circuit Court dismissed an Appeal from the award of Seven Thousand Eight Hundred Sixty-Two and 00/100 ($7,862.00) Dollars in attorney's fees and costs awarded the Defendant under the provisions of Rule 37(a)(4); and

g) *Socialist Workers Party v. Grubisic*, 639 F.2d 785 (7th Cir. 1982) cert. den. 107 S. Ct. 1753, Court dismissed an Appeal from the District Court's Order requiring the deposition of a non-party to be taken and awarding attorney's fees for "discovery problems" on the basis such Orders are not appealable.

The arguments posited by PDA are not novel and have been rejected by several Courts:

When a party's conduct during discovery necessitated its opponent's bringing motions which would

> have been unnecessary, the courts may properly order it to pay the moving party's expenses unless its conduct was 'substantially justified' or other circumstances make the award unjust.
>
> *Marquis v. Chrysler Corp.*, 577 F.2d 624 (1978).

In *Richard A. Persson, et al v. Faestel Investments, Inc. et al*, 88 FRD 668 (1980) the District Court for Northern Illinois held:

> There is no merit in plaintiffs' contentions seeking to exclude other preparation and court time from defendants' application. Charges for that time also constitute 'reasonable expenses incurred in obtaining the order'.

See also *Liberty Leather Corporation v. Richard Callum and Willard Helburn, Inc.*, 86 FRD 550 (1980) where the Court ordered the payment of counsel fees expended in preparing a Motion to Compel, notwithstanding the requested information was provided before the Court ruled on the Motion.

See *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (1978) where the prevailing party was awarded counsel fees for services performed before the date the requested information was to be produced, including appellate expenses as expenses properly included in the award of counsel fees.

The award of counsel fees under Rule 37(a)(4) to the Respondent Cutler did not occur in vacuum, and therefore all preparations leading to their award should be included as compensable time. The Magistrate's Order of September 1, 1982[2] says it very well:

> The undersigned believes that time spent by counsel for Cutler in researching and briefing issues involving Cutler's First Amendment rights as a news reporter and his rights under the Pennsylvania Shield Law as time spent in a subject matter area which was

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2 Appendix, p. 24a.

reasonably supportive of the claim upon which Cutler ultimately prevailed. Although the Court ruled that the information sought from Cutler was not relevant to the subject matter of the lawsuit and granted the Motion to Quash and denied the Motion to Compel on that basis, the argument advanced by Cutler based upon constitutional and statutory rights and privileges was certainly reasonably supportive of the claim upon which he prevailed. It was not, for instance, argument devoted entirely to a different claim.

The constitutional and statutory arguments were reasonable and they were directly in support of the claim upon which Cutler prevailed. Counsel for Cutler would have been remiss to omit these arguments, no matter how strong or certain of success the arguments based upon considerations of relevance appeared to be.

The modification by the District Court Magistrate's award of counsel fees by reducing them from Six Thousand Four Hundred Seventy-Five and 60/100 ($6,475.60) Dollars to Three Thousand Seven Hundred Ninety-Eight and 10/100 ($3,798.10) Dollars should never have occurred as it is contrary to 28 U.S.C. 636 (b)(1)(A) as construed by the Court in *Raddatz supra.* It therefore follows that arguments for further reduction – or elimination urged by PDA should be rejected.

It is respectfully suggested that PDA has made no cogent argument for setting aside the award of counsel fees notwithstanding that they urge that a question presented for the Court's determination is whether such an award made under Rule 37(a)(4) "unconstitutionally penalizes [a] party.[3]" In the "argument" aligned with that issue the only authority cited is *U.S. v. Jackson,* 390 U.S. 570 (1968) which arose out of a

3 Petition, page ii. Nor is it indicated they have served the Solicitor General as required under Rule 28(4)(b), Rules of the Supreme Court of the United States.

criminal proceeding requiring the court to pass upon the constitutionality of the federal kidnapping law. It is respectfully suggested the *Jackson* case has no probative value in a civil proceeding requiring a determination of whether there was a proper award under Rule 37(a)(4) of counsel fees in a failed attempt at forced discovery dismissed for lack of justification and relevancy.

CONCLUSION

For all of the above reasons, the Petition for Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

JOHN C. SULLIVAN
(Counsel of Record)

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Attorneys for
Bruce Cutler, Respondent

APPENDIX

Despite what we have just said, we do believe certain adjustments in the claimed fee are appropriate. In view of the scope of our order which awarded fees, we will not allow any time for activities which clearly pertained solely to the motions to quash and for a protective order (such as the actual drafting and revising of these motions). We will not allow time claimed for attending the Cutler deposition. Nor will we allow time for correspondence to (as opposed to conferences with) clients, for, although this may have been inevitably incident to the discovery motions, we do not view it as *necessary* for Cutler to prevail.[2] Further, we have reduced some of the hours claimed for research to avoid duplication of effort and in recognition of the fact that, although there were issues common to all motions, extensive research on all issues was probably not reasonably necessary for the purposes of defending the motion to compel. Finally, the work descriptions submitted by Craig Staudenmaier, Sullivan's associate, is so vague as to make it impossible to determine how many hours of research or preparation of memos were reasonably attributable to defending the motion to compel. Although we will not disallow *all* of Mr. Staudenmaier's time, we will make the substantial adjustment necessitated by the vagueness of the entries.

2 In some cases, our allocation has been imprecise, since there has oftentimes been no exact breakdowns of time spent on a particular task on a given date. For example, on May 25, 1982, the entry is "Review Brief of Pennsylvania Dental Association in Reply to Brief (Cutler's) in Opposition to Motion to Compel; Dictate letter to Client." The time for these two tasks is aggregated as .6 hours. Since we have decided that the correspondence is non-compensable we have in this case allowed .3 hours as the amount of time reasonably necessary to perform the first, compensable task.

In accordance with the above discussion, we will allow the following as "costs and fees:"[3]

John C. Sullivan	36.3 hrs.	x $95.00	=	$3,448.50
Craig J. Staudenmaier	3 hrs.	x $50.00	=	$ 150.00
Total Fees				$3,598.50
Costs				199.60
Total Due				$3,798.10

An appropriate order will be entered.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Date: December 28, 1982

ORDER

AND NOW, this 28th day of December, 1982, in accordance with the accompanying memorandum IT IS ORDERED THAT the third party plaintiffs reimburse John C. Sullivan, Esquire, counsel for Bruce Cutler, in the amount of $3,798.10.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

3 We conclude that the hourly rates claimed are reasonable in view of the experience of the attorneys involved.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS
OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

v.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-Claimants and
Third-Party Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

Complaint Filed 10/20/81
(Judge Caldwell)

**OPINION OF MAGISTRATE
IN RE: DISCOVERY PERTAINING TO
BRUCE CUTLER**

quote actually made the statement set forth. A fair reading of Cutler's deposition and the subject article reflects that no other conclusion is reasonable.

In light of the fact that Cutler appeared for his deposition of March 29, 1982 and answered the primary question of the Association's counsel, albeit in an indirect way, it is clear that Cutler's motion for a protective order requesting that the Court issue an order barring the requirement that he submit to deposing has been rendered moot. Likewise, to the extent that Cutler's motion to quash the Association's subpoena duces tecum contests the notice that he appear for a deposition, it, too, has been rendered moot by Cutler's actual appearance. However, to the extent that these motions question whether Cutler should be required to produce the documents requested by the Association, they remain at issue along with the Association's motion to compel.

These motions address the issue of whether Cutler should be made to produce the requested discovery or whether he is protected by the First and Fourteenth Amendments of the United States Constitution and the Pennsylvania "Shield Law", Act of 1976, P.L. 586, 42 Pa. C.S.A. § 5942. However, before any substantive discussion should be initiated on the law pertinent hereto, the Association's conceded purpose for deposing Cutler should be considered. This purpose appears at page 12 of the Association's brief filed on April 12, 1982, and is set forth in the following language:

> The Association contends that Joseph Friedman, Attorney for Blue Shield, violated both the Rules of the District Court for the Middle District of Pennsylvania and the Code of Professional Responsibility established by the Supreme Court of Pennsylvania for lawyers practicing in the Commonwealth of Pennsylvania when he made the statements which appeared in the Sunday Patriot-News article. The Association attempted to depose Mr. Cutler for the primary purpose of confirming that Mr. Friedman actually made the statements and determining the manner

On June 15, 1982, United States Magistrate John Havas filed an opinion and order by which he granted Bruce Cutler's motion for a protective order and to quash a subpoena at the same time denying the Pennsylvania Dental Association's motion to compel Mr. Cutler's testimony. In addition, the magistrate found that the motion to compel was filed without substantial justification and indicated that Cutler would be entitled to reasonable expenses in opposing the motion, as specified in Rule 37(b)(4) of the Federal Rules of Civil Procedure. The Dental Association has appealed the order, pursuant to 28 U.S.C. § 636(b)(1)(A) which provides for reconsideration of a magistrate's pre-trial order where the order is "clearly erroneous" or "contrary to law."

The factual situation which gives rise to this appeal is so well understood by all parties and counsel as to require no recapitulation on our part. We do not believe that the magistrate's conclusions are clearly erroneous or contrary to law and we will therefore affirm his opinion and order.

Although it has been brought to our attention that counsel for Mr. Cutler has not complied with Local Rule 402.6 we do not believe that it would be beneficial to deny his motions for that reason at this stage of the proceedings. The rule does not itself specify a sanction for non-observance, and, while we do not question Judge Muir's judgment in fashioning the sanction he believed appropriate at an earlier point in the proceeding, we will not impose sanctions now.

We do not address the various constitutional bases for the magistrate's opinion and order, since we need look no further than the issue of relevance in order to affirm his decision. Quite simply, we do not believe that the information sought from Mr. Cutler is relevant to the subject matter of the instant lawsuit and thus is not a permissible subject of discovery under Rule 26(b) of the Federal Rules of Civil Procedure. We are aware that the Dental Association has filed a motion to dismiss Pennsylvania Blue Shield's counterclaim based in part on alleged extrajudicial statements made by counsel for Blue Shield and reported

by Mr. Cutler in the Sunday Patriot News. We do not decide or even address the motion to dismiss in our decision today: we simply hold that the information sought from Mr. Cutler is not relevent to the motion's determination, since the information sought in discovery has nothing to do with the dissemination of the allegedly prejudicial statements or of their effect on prospective jurors.

Finally, in light of the above, we affirm the magistrate's award of reasonable expenses and attorney's fees to Cutler in connection with opposing the motion to compel. This result is authorized by Rule 37(a)(4) and we do not find the magistrates's conclusion, that the motion was filed without substantial justification, to be clearly erroneous or contrary to law. We interpret this award to include expenses and fees incurred in connection with the instant appeal, and shall direct that supporting affidavits and memoranda be filed accordingly.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Date: July 23, 1982

Order

AND NOW, this 23rd day of July, 1982, the magistrate's order of June 14, 1982, is affirmed. Bruce Cutler and his counsel are directed to submit to the magistrate an affidavit and memorandum which set forth the reasonable costs and fees expended in defense of the Dental Association's motion including expenses in connection with the instant appeal. These documents are to be submitted on or before August 5, 1982, and the Dental Association may file opposing papers within ten days of the date of filing of Cutler's submissions.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

PENNSYLVANIA DENTAL ASSOCIATION, et al.,

Third-Party Plaintiffs

vs.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA,
d/b/a PENNSYLVANIA BLUE SHIELD; et al.,

Third-Party Defendants

MEMORANDUM

Before the court is an appeal from the magistrate's order of September 1, 1982, which awarded John C. Sullivan, Esq., counsel for Bruce Cutler, $6,475.60 in costs and fees in connection with the defense of a motion to compel production of documents filed by the Pennsylvania Dental Association. To the extent that the magistrate's order concerns a dispositive matter: the fees and costs due Cutler's counsel (Cutler being a non-party) we agree that the magistrate should have filed a report, to which exceptions could be filed rather than an order requiring a statement of appeal.[1] We will, therefore, apply the scope of review applicable to a report, treat the statement of appeal as exceptions, and review *de novo* those matters to which exceptions have been taken.

We agree with PDA that, pursuant to our order affirming Magistrate Havas' report, fees and costs were to be awarded only in respect to the defense of the motion to compel production. Bruce Cutler's prior motions to quash the subpoena and for a protective order had been dismissed as moot by the magistrate. Nevertheless, we feel that we cannot completely discount all time spent prior to the motion to compel, since common factual and legal themes ran through all motions. In other words, conferences held with clients precipitated by the initial subpoena undoubtedly involved discussions of fact as pertinent to the defense of the motion to compel as to the motions to quash and for protective order. Similarly, although we are aware that there was not complete identity of legal issues among the motions, common legal areas did exist, and we cannot say that legal research undertaken prior to the motion to compel could not nevertheless bear upon it. Finally, although the motion to compel was ultimately denied on the basis of relevency, we cannot flatly say that the constitutional issues were so extraneous as to be unreasonably included in the preparation for and presentation of the motion.

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1 This was the procedure followed earlier in similar matters, and should also have been used for the sake of consistency.

Bruce Cutler is a newspaper reporter for the Patriot News Company which publishes newspapers in the Harrisburg, Pennsylvania area entitled the "Patriot," the "Evening News," and the "Sunday Patriot News." On March 14, 1982 an article appeared in the Sunday Patriot News under the heading "Blue Shield Sues Dentists on Four Antitrust Counts" which carried Cutler's byline.[1] In this article various quotes are attributed to Joseph Friedman, Attorney for Blue Shield, and, to a lesser extent, Patrick Boyle, the Press Secretary of Pennsylvania Attorney General LeRoy Zimmerman, and E. J. Shreiner, II, Vice President of Corporate and Public Affairs for Pennsylvania Blue Shield. Essentially, the subject article outlines the thrust of Blue Shield's claims in this matter, and the most significant sources of the article appear to be the pleadings and some brief quotes attributed to Friedman.

Presently under consideration are three motions involving discovery requests made by the Pennsylvania Dental Association and the other defendant, counter-claimant, third-party plaintiff Associations ("Association"), including a motion for protective order filed by Cutler, Cutler's motion to quash a subpoena duces tecum and the Association's motion to compel Cutler to produce documents. All of these motions raise the same central issue, that is whether Cutler, as a newspaper reporter, should be made to comply with the Association's discovery requests.

Initially, it should be noted that on May 17, 1982 Cutler did appear for the taking of his deposition by the Association's counsel. However, he did not bring any notes or other documents with him which were requested by the Association's counsel. Furthermore, at the said deposition, upon the advice of his counsel, Cutler refused to answer many questions posed to him. Most of these questions really amounted to one question, that is whether the quotes attributed to Friedman in the said

1 A copy of the subject article is attached as an exhibit to the March 29, 1982 deposition of Cutler.

article were actually made by Friedman. However, a close reading of Cutler's March 29, 1982 deposition reveals (at page 12 thereof) that this question *was* really answered by Cutler, as evidenced by the following discussion:

> By Mr. Beckley (Association's Counsel):
>
> Q. Let me go at it this way: Mr. Cutler, if you would be so kind, would you look at column 3, please, of the article. I notice a quote there that says, "Blue Shield has lost millions (of dollars) in dental insurance business but for the actions of the dentists." Friedman said. "I can't go beyond that." Did Mr. Friedman, in fact, say that to you?
>
> Mr. Sullivan (Cutler's Attorney):
>
> Objection.
>
> Mr. Beckley:
>
> Your basis, Mr. Sullivan?
>
> Mr. Sullivan:
>
> On the basis that you are inquiring into confidential sources. To the extent it is published, the article speaks for itself.
>
> A. (By Cutler) That's correct.
>
> Mr. Beckley:
>
> Okay. Thank you.
>
> A. (By Cutler) Correct, Mr. Sullivan. The article speaks for itself.

On the following page of the deposition Cutler's attorney repeats that "[t]o the extent (the subject article) is published, it speaks for itself." Thus, both Cutler and his attorney *did* in essence answer the primary question posed by the Association at the deposition of March 29, 1982 by asserting that where the article in question attributes quotes to certain individuals, including Friedman, the individual who is attributed to the

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3413

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS PARENS PATRIAE

v.

PENNSYLVANIA DENTAL ASSOCIATION, et al.

v.

CO. OF PA.: CO. OF PA. OFFICE OF ATTY. GEN., et al.

Pennsylvania Dental Association (P.D.A.)
Appellant

No. 83-3076

PENNSYLVANIA DENTAL ASSOCIATION, et al.

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD, et al.

Pennsylvania Dental Association, Appellant

(D.C. Civil No. 81-1187)

Judgment Order

Pennsylvania Dental Association appeals from an order of the district court, affirming the order of a magistrate, denying its motion to compel discovery from Bruce Cutler, who is not a party, and who claims the protection of the Pennsylvania reporters shield law and the federal common law reporters' privilege. Pennsylvania Dental Association also appeals from a district court order awarding fees and costs in the amount of $3,798.10, pursuant to Fed. R. Civ. P. 37(a)(4). The orders are reviewable. *National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595 (3d Cir. 1980). We have considered all of the contentions of Pennsylvania Dental Association and find them to be without merit. Cutler urges that the amount of the award should be increased to the amount determined by the magistrated but Cutler did not file a cross-appeal.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

BY THE COURT,
(s) John J. Gibbons
Circuit Judge

Attest:
(s) Sally Mrvos
Sally Mrvos, Clerk

DATED: Oct. 25, 1983

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

vs.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-Claimants and Third-Party Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

MEMORANDUM AND ORDER

> Fed. Rule Civ. Proc. 1 must be heeded, and that "district courts should not neglect their power to restrict discovery" in the interest of justice or to protect the parties from undue burden or expense. (At pgs. 179, 180).

This action involves many antitrust claims and counterclaims and comes within the meaning of the euphemistic phrase "complex litigation." Counsel for all of the parties have a great deal to do just in the realm of discovery prior to trial. Stated succinctly, the undersigned has a great deal of difficulty in understanding why in the world the Association's counsel would make Bruce Cutler part of this heated process simply because he wrote an article on this matter in which he attributes quotes to Blue Shield's counsel and simply because he felt that Blue Shield's counsel should not be commenting hereon.

Clearly, any desire to have Blue Shield's counsel removed from this action hardly is relevant to the legal and factual issues central hereto, which legal and factual issues are legion. If, as the Association's counsel professes, he has an actual concern about the propriety of Friedman's alleged statements and "the ability of the Association to obtain a fair trial in the Middle District" he should have so advised this magistrate of these concerns and the bases therefor. Quite frankly, it is not the Association's counsel's task to determine whether Blue Shield's counsel should be allowed to continue in this case. It is the Court's decision. In respect to the Association's ability to obtain a fair trial in the Middle District, it should be noted that juries for this expansive District are chosen from all of its 32 counties and not just the area in which the Sunday Patriot News is circulated. Indeed, even assuming, *arguendo*, that all of the jurors on this matter came from the Harrisburg area, the Association's counsel's argument that it may not be able to obtain a fair trial here simply because of Cutler's article of March 14, 1982 and Friedman's alleged statements therein is totally unpersuasive. In conclusion, the very basis for which the Association's counsel seeks the subject discovery from Cutler is totally *ir*relevant to the substantive subject matter of this

> the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand.

Again, here the "need for the evidence sought" is essentially nil insofar as it pertains to the merits of this litigation. Therefore, any balancing of interests clearly leans in favor of the press' qualified First Amendment privilege. Once more, too, if the matter of the propriety of Blue Shield's counsel's actions in this litigation become an issue it will be for the Court or the Disciplinary Review Board of the Pennsylvania Bar Association to address them, and *not* the Association's counsel through some self-appointed witch hunt carried out under the guise of discovery.

In *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), the Court ruled that a television network and its employee were required to produce verbatim statements of potential government witnesses to a criminal defendant. However, once again, the Court in *Cuthbertson* stressed the need for showing the particular relevance of the evidence sought and additionally noted that in weighing the "delicate balance of interest" between the need for certain evidence and a journalist's qualified privilege not to disclose unpublished information even a criminal defendant must *first* show that he is unable to acquire such information from another source that does not enjoy the protection of this privilege. *Supra*, at page 148.

Here, the Association's counsel attempts to argue that the information which he sought from Cutler was not available from other sources. However, at a brief pretrial conference on June 9, 1982 the undersigned confronted Mr. Friedman with this matter and received a candid response. The Association's counsel's contention that the so-called "evidence" sought could only be acquired by deposing Cutler is frivolous.

An order will be issued this day granting Cutler's motion for a protective order and motion to quash the subpoena to the extent that they are not moot, and denying the Association's

motion to compel Cutler to produce documents. In light of the absence of any substantial justification for the Association's motion in respect to Cutler, Rule 37(b)(4) requires that the Association pay Cutler's "reasonable expenses in opposing the motion, including attorney's fees." Therefore, the order issued this day will also direct counsel for Cutler to submit an affidavit and memorandum to the Court which set forth Cutler's reasonable attorney's fees and other costs expended in the defense of the Association's motion.

(s) John Havas
John Havas
United States Magistrate

Dated: June 14th, 1982.

ORDER

AND NOW, this 14th day of June, 1982, IT IS HEREBY ORDERED that Cutler's motion for a protective order and motion to quash are granted to any extent that they are not now moot, and the motion to compel of the Pennsylvania Dental Association is denied. IT IS FURTHER ORDERED that the Association's motion to compel was filed with an absence of any "substantial justification," and therefore that Fed. Rule Civ. Proc. 37(b)(4) requires that the said Association pay Cutler's reasonable expenses in opposing the motion, including attorney's fees. Cutler and his counsel are directed to submit an affidavit and memorandum to the Court which sets forth Cutler's reasonable attorney's fees and other costs expended in the defense of the Association's motion on or before June 30, 1982.

(s) John Havas
John Havas
United States Magistrate

Dated: June 14, 1982.

Opinion of the Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1187

COMMONWEALTH OF PENNSYLVANIA IN ITS OWN BEHALF AND AS *PARENS PATRIAE*,

Plaintiff and Counter-Defendant

v.

PENNSYLVANIA DENTAL ASSOCIATION, *et al.*,

Defendants, Counter-Claimants and Third-Party Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Third-Party Defendants

Complaint Filed 10/20/81
(Judge Caldwell)

OPINION AND ORDER OF MAGISTRATE

RE: COUNCIL FEES FOR ATTORNEYS FOR BRUCE CUTLER

order and motion to quash subpoena and objections to inspection and copying of materials. Consistent with this assertion, it argues that all time claimed to have been spent by counsel for Cutler prior to April 27, 1982 should not be reimbursed. The undersigned fails to discern any compelling reason in this distinction that has been asserted by PDA. The time spent by counsel for Cutler had to do with precisely the same subject matter, PDA's efforts to discover certain information believed to be possessed by Cutler, and the fact that some of this time was expended in the affirmative effort to prevent the deposition and consequent possibility of contempt proceedings, while other portions of the time were spent in opposing PDA's motion to compel, is a distinction without a difference, the undersigned believes. PDA has not set forth any substantive or persuasive argument in support of the distinction, and the undersigned simply is not persuaded by PDA's argument that there is an operative distinction.

Secondly, PDA claims that the request for reimbursement for time spent by Cutler's associate counsel, Craig J. Staudenmaier, should be denied because 7.8 hours of Staudenmaier's time was spent as of March 31, 1982. This second argument on PDA's part is essentially a reiteration of the first argument; i.e., that any time spent in connection with the motion to quash, as opposed to the motion to compel, should not be compensated. For the same reasons noted above, the undersigned does not find this argument to have any merit.

The third argument advanced by PDA is that only those hours that can reasonably be attributed to the argument that the information possessed by Cutler was not relevant to the antitrust litigation should be allowed, since the lack of relevance was the reason relied upon by the Court to deny the motion to compel and to grant the motion to quash, and that any amount of attorney time spent to brief and research issues relating to Cutler's First Amendment rights and rights under the Pennsylvania Shield Law should be disallowed. In advancing this argument, PDA cites decisions in which the Courts have ruled

that the time spent by an attorney should be reimbursed only to the extent that such time was spent in an endeavor which was reasonably supportive of the claim upon which his client(s) prevailed. The undersigned believes that time spent by counsel for Cutler in researching and briefing issues involving Cutler's First Amendment rights as a news reporter and his rights under the Pennsylvania Shield Law was time spent in a subject matter area which was reasonably supportive of the claim upon which Cutler ultimately prevailed. Although the Court ruled that the information sought from Cutler was not relevant to the subject matter of the lawsuit and granted the motion to quash and denied the motion to compel on that basis, the argument advanced by Cutler based upon constitutional and statutory rights and privileges was certainly reasonably supportive of the claim upon which he prevailed. It was not, for instance, argument devoted entirely to a different claim.

The constitutional and statutory arguments were reasonable and they were directly in support of the claim upon which Cutler prevailed. Counsel for Cutler would have been remiss to omit these arguments, no matter how strong or certain of success the argument based upon considerations of relevance appeared to be. Furthermore, the cases cited by PDA in support of its argument that the attorneys' fees for Cutler's attorneys should be reduced for time spent on the constitutional and statutory arguments do not persuade the undersigned that that result should follow. On the contrary, a review of the matters in those cases that were treated as claims other than the "claims upon which [the party] was successful" supports rather than defeats a finding in the present case that the constitutional and statutory arguments in support of Cutler were part and parcel of the claim upon which he was successful. For example, in *Baughman v. Wilson Freight Forwarding Company*, 583 F.2d 1208, 1214 (3d Cir. 1978), the claim upon which the plaintiff was successful was an antitrust conspiracy claim. The claim upon which he was unsuccessful was a state law cause of action based upon an alleged tortious interference with business relationships. In that case, therefore, the term "claim" for pur-

poses of an attorney's fee award, was construed to be synonymous with "cause of action." By analogy, Cutler's "claim" or cause of action, was that he should be relieved from a duty to answer the deposition questions. All arguments advanced in support of that claim were a part and parcel of the claim. PDA has cited no case where the term "claim" for purposes of an award of attorney's fees has been held to be descriptive of one particular argument, to the exclusion of all other arguments, which is ultimately viewed by the Court as the reason why a party should prevail upon a given controversy. The undersigned cannot agree with PDA that the time spent by counsel for Cutler in researching and briefing the arguments based upon constitutional and statutory rights and privileges enjoyed by Cutler should not be allowed for purposes of reimbursement.

No other objections or assertions are advanced by PDA in connection with the amount of attorneys' fees and costs claimed on behalf of Cutler.

WHEREFORE, for the foregoing reasons, it is hereby ORDERED that the Pennsylvania Dental Association shall reimburse John C. Sullivan, Esquire, counsel for Bruce Cutler, in the amount of $6,475.60.

(s) J. Andrew Smyser
J. Andrew Smyser
United States Magistrate

Dated: September 1, 1982.

> in which Mr. Cutler was provided with the information. The information sought from Mr. Cutler is vital to the case as it affects the ability of the Association to obtain a fair trial in the Middle District and the ability of Mr. Friedman's firm to continue in the case.[2]

In *Herbert v. Lando*, 441 U.S. 153 (1978), the Supreme Court addressed the question of whether a member of the press is protected by the First Amendment from submitting to discovery which addresses the question of "actual malice" in a defamation action. In holding that the First Amendment does not so protect the press from a defamation action the Court in the following manner noted that the issue of actual malice goes to the very heart of defamation claims, claims which often involve members of the press:

> We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel,

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2 Local Rule of Court 118.7, which fairly well parallels Disciplinary Rule 7-107(g), is entitled "Extrajudicial Statements by Attorneys in Civil Cases," and states the following:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(a) Evidence regarding the occurrence or transaction involved.

(b) The character, credibility, or criminal record of a party, witness, or prospective witness.

(c) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(d) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(e) Any other matter reasonably likely to interfere with a fair trial of the action.

(f) Any reference to the amount demanded, offered or involved.

> elements that are critical to plaintiffs such as Herbert. The case for making this modification is by no means clear and convincing, and we decline to accept it. In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredience of malice . . . (At pgs. 169, 170).

In his concurring opinion, Justice Powell again stressed that the majority's opinion in *Herbert* was based upon the crucial relevance of the evidence sought. However, Powell, by means of the following language, stressed that where information sought by discovery from members of the press is *not* so relevant a very critical analysis is required to weigh the needs of the party seeking the information and the need for some First Amendment protection for the press:

> Under present Rules the initial inquiry and enforcement of any discovery request is one of relevance. Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights a District Court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the important public interest in a free flow of news and commentary. (Citing cases). On the other hand, there also is a significant public interest in according two civil litigants discovery of such matters as may be genuinely relevant to their lawsuit. Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law. In performing this task, trial judges – despite the heavy burdens most of them carry – are now increasingly recognizing the "pressing need for judicial supervision." . . . The Court today emphasizes that the focus must be on relevance, that the injunction of

litigation. Again, if the Association's counsel has concerns with respect to Friedman's purported statements to the press he should so advise the Court, rather than needlessly involving an understandably troubled member of the press.

In view of the complete *lack* of relevance of the discovery sought by the Association's counsel from Cutler, the pertinent substantive law does not have to be addressed in significant detail. However, it will be reiterated that a good part of Cutler's argument for protection from the sought after discovery is based upon the Pennsylvania Shield Law, which states the following:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained from such person, in any legal proceeding, trial or investigation before any Government unit.

In *In re: Taylor*, 412 Pa. 32 (1963), the Pennsylvania Supreme Court ruled that the language of the Pennsylvania Shield Law clearly applied to "documents as well as personal informants," as reflected by the use of the general term "source of information." In *Reiley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), the Third Circuit ruled that while it was not bound to follow the Pennsylvania Shield Law, it found that it was in conformance with a qualified federal common-law privilege enjoyed by journalists and therefore deemed that it would not ignore this Pennsylvania statute. The Court further noted the following (at p. 716):

> When a privilege is grounded in constitutional policy, a "demonstrated, specific need for evidence" must be shown before it can be overcome. *United States v. Nixon*, 418 U.S. 683, 713, 94 Supreme Court 30, 90, 41 L.Ed. 2d 1039 (1974). Therefore, we must balance on one hand

On October 20, 1981, the Commonwealth of Pennsylvania filed a Complaint against nine dental associations, charging antitrust violations under § 1 of the Sherman Act, 15 U.S.C. § 1. The defendant dental associations, as third-party plaintiffs, filed a third-party Complaint against the Commonwealth of Pennsylvania, the Attorney General of Pennsylvania, a deputy attorney general of Pennsylvania, Pennsylvania Blue Shield and Donald S. Mayes, D.D.S., on November 17, 1981. On March 12, 1982 Pennsylvania Blue Shield filed a Complaint and third-party counterclaim against the associations and other third-party counterclaim defendants.

On March 18 and March 19, 1982, the dental associations served notices of deposition and subpoenas upon Bruce Cutler, a reporter for the Patriot Evening News Company. Cutler is not a party to the antitrust case. On March 26, 1982 Bruce Cutler filed a motion to quash the subpoena and objections to the inspection or copying of materials. Briefs in support of the motions and objections were filed with the Court.

Bruce Cutler appeared at a deposition hearing on March 29, 1982 and asserted rights and privileges to decline to answer questions asked of him under the Pennsylvania "Shield Law" and the First Amendment of the Constitution of the United States. On April 14, 1982, the Pennsylvania Dental Association (PDA) filed a motion to compel Bruce Cutler to produce documents.

On June 15, 1982, former United States Magistrate Havas filed an Order granting Bruce Cutler's motion to quash and motion for a protective order. The Order of June 15, 1982 also denied PDA's motion to compel and found that the motion to compel was filed with "an absence of any substantial justification." The Order directed PDA to pay Bruce Cutler's expenses, including attorneys' fees incurred in opposing the motion. On June 25, 1982, the Pennsylvania Dental Association filed a statement of appeal from the Order of the Magistrate. By Order of July 23, 1982, the Court (Caldwell, J.) affirmed the June 15, 1982 Order of former Magistrate Havas granting Bruce

Cutler's motions, dismissing PDA's motion to compel and directing PDA to pay Bruce Cutler's expenses, including reasonable attorneys' fees. The Court directed Bruce Cutler and his counsel to submit an affidavit and memorandum setting forth the expenses and fees incurred in defense of PDA's motion, including expenses incurred in connection with the appeal from the Magistrate's Order.

Counsel for Bruce Cutler has filed an affidavit in response to the Order of July 23, 1982, together with a memorandum in support thereof. The affidavit and memorandum were filed on August 5, 1982. On August 16, 1982, PDA filed a brief in opposition to the affidavit of counsel for Bruce Cutler. On August 26, 1982, Bruce Cutler filed a reply brief. On August 31, 1982, counsel for Cutler filed a supplemental affidavit.

The matter of attorneys' fees and costs for the representation of Bruce Cutler in connection with the effort of PDA to depose him and to require him to produce documents is now ripe for disposition.

In his affidavit, counsel for Bruce Cutler has stated that his hourly rate is $95.00 and that the hourly rate for his associate counsel is $50.00. He requests Court approval for reimbursement in the amount of $6,475.60. Counsel for Bruce Cutler has submitted an itemized listing of the various functions that were performed on behalf of Bruce Cutler in connection with the involvement on Cutler's part in the antitrust litigation, and has stated the amounts of time that were spent in the various functions. On its face, counsel's affidavits state an adequate basis for the Court to direct reimbursement in the amount requested, $6,475.60.

In their brief in opposition to the initial affidavit of counsel for Bruce Cutler, PDA has asserted various reasons why it believes that the amount claimed by counsel for Bruce Cutler is excessive and should be pared by the Court. First, it asserts that Cutler's attorney is not entitled to be compensated for hours spent in the preparation of Cutler's motion for a protective

Rules of Evidence for the United States Courts and Magistrates

ARTICLE V

PRIVILEGES

RULE 501 – GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.